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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 673.

THE MEMPHIS AND CHARLESTON RAILROAD COMPANY, THE MOBILE AND OHIO RAILROAD COMPANY, AND THE KNOXVILLE AND CHARLESTON RAILROAD COMPANY, PLAINTIFFS IN ERROR,

vs.

JAMES L. GAINES, *Comptroller of the State of Tennessee.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

FILED APRIL 20, 1878.

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1 *In Chancery Court of Davidson County, Tennessee.*

To the Hon. WM. F. COOPER, chancellor, presiding in the chancery court of Davidson county, at Nashville, in the State of Tennessee:

THE MEMPHIS AND CHARLESTON RAILROAD COMPANY, of the State of Tennessee, Complainant,

vs.

JAMES GAINES, (comptroller of the State of Tennessee,) of Davidson county, Tenn.; THOS. R. SHEARON, of Obion county, Tenn.; J. W. EWING, of Giles county, Tenn.; and FRANK A. MOSES, of Knox county, Tenn., Defendants.

Complainant respectfully shows your Honor that on the 2d of February, 1846, the general assembly of the State of Tennessee passed an act chartering and incorporating complainant by the name of "The Memphis and Charleston Railroad Company," giving to it all the usual rights, powers, privileges and franchises of a private corporation, and creating it for the express purpose of building and operating as a common carrier of freight and passengers, a railroad from Memphis, in the State of Tennessee, to Charleston, in the State of South Carolina.

Complainant corporation was duly and legally organized
2 under said charter, and in accordance with the laws of the State of Tennessee, which charter, with the various amendments thereto, will be filed herewith on or before the hearing.

Complainant completed its road on the 28th day of March, 1857, and has been using it continuously, as a common carrier of passengers and freight, from the date of its completion to the present, and will continue to exercise its franchises in future.

Complainant's line of road, in Tennessee, extends from the city of Memphis, eastwardly through the counties of Shelby, Fayette, Hardeman and McNairy, to the western boundary line of the State of Mississippi, a distance of — miles; a part of its track and a depot are situated in Memphis, and the track runs through the following incorporated towns in the State of Tennessee: Memphis, Collierville, Moscow, Somerville, La Grange, Grand Junction, Saulsbury, Middleton and Pocahontas. That its capital stock is $\$5{,}312{,}725\frac{00}{100}$, and its bonded indebtedness is $\$4{,}249{,}000\frac{00}{100}$. Complainant further shows that, in and by the 38th section of its original charter, it is provided: "The capital stock of said company shall be forever exempt from taxation, and the road, with all its fixtures and appurtenances, including
3 shops, warehouses and vehicles of transportation, shall be exempt from taxation for the period of twenty years from the completion of the road."

Complainant also shows, that all the successive general assemblies of the State of Tennessee, and every department of the State government, from the date of complainant's charter, in 1846, to the year 1875, continuously and uniformly acquiesced in, and practically recognized the existence of this charter exemption from taxation, and never once attempted to violate it by taxation on its capital stock or property.

Complainant also avers that there are as many as twelve railroads chartered by the legislature of the State of Tennessee, at successive dates from 1836 to 1875, with like exemptions from taxation given in their charters, and in no instance has the legislature attempted to violate these charter exemptions, or questioned their validity, from 1836 to 1875; on the contrary, they have continuously omitted their property from the imposition of taxes, because they were so exempt.

Complainant further avers that, on the 20th of March, 1875, the general assembly of the State of Tennessee passed an act, ch. 78 of the acts of 1875, p. 100, prescribing the mode and manner of valuing the property of the railroad companies in the State for taxation. This act and the act
4 amendatory thereof, hereinafter set forth, includes in its provisions, as subject to taxation, all railroads in the State, and nowhere except or exclude from their operation railroads whose charter contracts contain exemptions from taxation, as that of your orator. This act of 1875, after reciting that section 28 of article 2 of the State constitution of 1870, provides: "That all property shall be taxed," and further, "according to its value, to be ascertained in such manner as the legislature shall direct, so that taxes shall be equal and uniform throughout the State; the 1st section prescribes that each railroad company, owning and operating a railroad in this State, shall, on or before the first day of May of each year, make out and file with the comptroller of the treasury, a complete schedule of all its property, real, personal and mixed. This section then proceeds to enumerate minutely every species of property of a railroad, to be set forth in the required schedule, including its capital stock, franchises, length of track in each town, in each county, and in the State, its gross annual receipts, and every other thing belonging to it in this State.

The 2d section provides for the appointment, by the Governor, of three citizens, freeholders, as railroad tax assessors for the State at large.

5 Section 3 prescribes the mode in which this board of assessors shall meet at Nashville and test and estimate the value of the property of every railroad company in the State, whether such railroad has filed or neglected to file the required schedule. As complainant does not complain of the value assessed

against or upon its property, these provisions are omitted, and the court is referred to said section, if necessary, for its provisions minutely.

The 4th section prescribes further power in the assessors to value the property of railroads omitting to furnish schedules.

The 5th section simply fixes the number of the board competent to act, to wit, two, and fixes their compensation.

The 6th section appoints the Governor, Secretary of State, and Treasurer a board of examiners to consider and determine whether the amount assessed or valued to each railroad company for taxation is too low, or is not just and fair, with power to appoint a new board of assessors to make a new and just assessment.

Section 7 provides that on these valuations so ascertained and certified to the comptroller, he shall ascertain the amount of taxes due the State from each company and notify it of the same,
6 and shall certify to each county and incorporated town the amount to be taxed by them respectively.

Section 8 declares the taxes so assessed in behalf of the State shall be due as other taxes; and if not paid, provides for their collection by distress warrant and sale of the property of the road and all its rights, franchises, &c., and for a writ of possession from the Governor to any sheriff, to put the purchaser in possession of the road and all the other property at once.

Section 9 provides the tax collector of each county shall collect the taxes due the county as in cases of other delinquents.

Section 10 declares the valuation of railroad property for taxation in a city shall be upon the same basis as that of a citzen taxpayer.

Section 11 provides that any railroad company which will accept as a special amendment to its charter for ten years from January 1, 1875, and will pay annually to the treasurer of the State 1½ per cent. on its gross receipts, shall be exempt from the foregoing provisions of this act, and such payment shall be in full of all taxation; this payment to be made on the 10th of January of each year for the preceding year. And if any company, after accepting this amendment, fail to make the annual pay-
7 ment, this section points out and gives a mode of collecting such delinquent tax. This section contains also a proviso that the charters of all railroad companies accepting the provisions of this 11th section shall be hereby so amended that after the expiry of said ten years no exemptions of any property of said company shall exist, but shall be placed upon the same footing of the property of other corporations or individuals, and every provision of such company's charter exempting their property from taxation is declared null and void. Claimant further avers that, as before shown, the 38th section of its charter exempted its capital stock forever from taxation, and its property for twenty

years after the completion of its road: that as its road was completed on the 28th of March, 1857, its property was exempt to the 28th of March, 1877, and was not liable to assessment for taxation, nor to taxation by the State, nor by any county or town in the State, for the year 1875, nor for the year 1876, nor for the year 1877, up to the 28th of March, 1877; but notwithstanding this exemption secured to complainant by its charter contract from taxation in 1875, 1876, and 1877, yet complainant, relying on the good faith of the State, accepted the provisions of said 11th section of said act of 1875 as an amendment to its charter, and in compliance with its requirements made the report of its
8 entire gross earnings for the year 1875 to the comptroller by the 10th day of January, 1876, and then paid 1½ per cent. on said earnings into the treasury of the State, making the sum of $5,691, and did the same on the 10th day of January, 1877, for the year 1876, amounting to $5,581. Complainant therefore insists that the 11th section aforesaid is a part of its charter, and that, as a matter of contract, founded on a valuable consideration—*i. e.*, the surrender of its prior charter exemptions—complainant has the perfect legal right to total exemption from all other taxation than 1½ per cent. each year on its gross earnings from January, '75, to January, '85. But in violation of the exemptions of its original charter, and of that of the 11th section, the general assembly of the State of Tennessee, at its session of 1877, on the 20th of March, 1877, passed an act, ch. 19, p. 31, amendatory of the act of March 20, 1875, aforesaid, repealing the 11th section thereof and its provisions, and making the following changes in the mode of assessment and valuation prescribed by said act, ch. 78:

Section 1st declares the railroad assessors shall hold their office for two years, and until their successors are appointed and qualified.

Section 2 requires the assessors at their first meeting to
9 elect one of them as president of the board, appoint a secretary, who shall keep a transcript of their entire proceedings, and file away their reports, documents, and proofs.

Section 3 provides, for the board, on completing the assessment of any railroad, to give notice, for four days, by newspapers, at Nashville, Knoxville, Jackson, and Memphis; and all persons interested may, in ten days after the notice, file exceptions to the assessments, with proof, which shall be examined by the assessors, and if convinced of error, they shall correct it, and certify it to the comptroller.

Section 4 prescribes mode of taking proof and hearing exceptions.

Section 5, governor may call assessors together at any time.

Section 6, exemptions under section 3, of the act of March 20, 1870, only $1,000.

Section 7 declares the assessment to be for two years.

Section 8 provides, that all railroads in the State shall, by May 1, 1877, and each successive two years, furnish the schedule and report of property; and the assessors shall assess all railroads in the State, and where any railroads have not been assessed for taxation under the first ten sections of the act of March, 1875, by reason of having accepted and complied with the provisions of section 11 of said act, their roads shall be assessed for 1875, and 1876, and all railroads in the State shall be assessed for 1877, and 1878.

10 Section 9, that all railroads in the State, which accepted and complied with the provisions of section 11, shall be entitled to a credit for the sums paid by them respectively to the State, upon the amounts due by them to the State, under the assessment made or to be made under the acts of '75, and '77, for the years '75, '76, '77; and any excess for said years shall be refunded by the State to said railroads, with interest.

The remaining sections, from 10 to 17, inclusive, do not touch the questions proposed be presented by this bill, and are, therefore, not quoted. It is evident that sections 8 and 9 expressly repeal section 11, of chapter 78, of the acts of March 20, '75, and provides for the taxation of all the railroad companies in the State, without regard to any exemptions contained in their original charter, or to the exemptions secured to them by accepting section 11, of chapter 78, of the acts of 1875, as an amendment to their respective charters.

Complainant further avers, that pursuant to the provisions of the acts, chapter 78, of 1875, p. 100, and chapter 19, p. 31, of 1877, the governor appointed the defendants, Thomas R. Shearon, J. W. Ewing, and Frank A. Moses, as the board of assessors of the State at large for the years of 1877, and 1878. After due

11 qualification they demanded of complainant the required schedules of its property; and complainant, without waiving any of its exemption, furnished them the schedule prescribed by said acts. Said board proceeded to test and value the property of complainant for taxation on behalf of the State, and of the several counties and incorporated towns through which the railroad of complainant runs. A list of these valuations is herewith filed, marked Exhibit A, and prayed to be taken as part of this bill. After making them, the said board gave the notice of four days, through the newspapers, as required by the third section, of the fact of the completion of said assessment of complainant's road. Complainant thereupon filed two exceptions and protests with said board, to said assessment, within the ten days allowed by said 3d section, as well as the proofs of the facts on which said protests and exceptions are filed, said protests and exceptions set up and rely upon the exemption from all taxa-

tion forever, as to its capital stock, and for twenty years as to its other property, granted in the 38th section of the original charter of complainant, hereinbefore quoted, and also upon the provisions of the 11th section of the act, chapter 78, p. 100, of the
12 acts of March 20, 1875, as an amendment to its charter, and as confining, by contract, the power of the State for ten years, from January 1, 1875, to the 1½ per cent., on its annual gross earnings, as the only mode and measure of taxation. Complainant filed with said exceptions, the deposition of S. R. Cruse, treasurer of complainant, proving the date of the completion of complainant's road to have been March 28, 1857, and also filed, from the office of the comptroller, the record evidence of its acceptance of the provisions of the 11th section of said act, chapter 78, of 1875, by payment, for 1875, and 1876, into the State treasury, of the 1½ per cent. of its gross earnings, that is to say, the sum of $5,691, for 1875, and $5,581, 1876. Said board of assessors are now considering said exceptions and proof, and will probably act upon the same within the next three days; and complainant has no doubt they will overrule said exceptions, as not within their power or duty to decide, because said act imperatively requires them to assess all roads, without reference to exemptions contained in their charters, submitting to said assessors the question of value alone. Complainant is advised that this is, manifestly and plainly, the true construction of the acts in this regard. By section 6, of the act of March 20, 1875, and section 3, of that of 1877, said assessors are required to certify their first assess-
13 ment or corrected assessment to the comptroller, and complainant avers that said assessors will certify said assessment of complainant's property to the comptroller as correct, within the next three days, unless restrained by the fiat of this Court.

As hereinbefore averred, the 7th section commands the comptroller, on the assessments so certified to him by the assessors, to ascertain the amount of taxes due the State from each company, and to notify it of the same; and to certify to each county and incorporated town, the amounts to be taxed by them respectively. Complainant avers that unless restrained by the fiat of this court, the comptroller will, immediately on the assessors filing with him the assessment aforesaid of complainant's property, proceed to certify to each of said counties and incorporated towns, through which complainant's road runs, the amount to be taxed by them for 1875, 1876, 1877 and 1878, and will proceed to ascertain the amounts, under said acts, due to the State from complainant for the years '75, '76 and '77, and will proceed forthwith, according to the provisions of the 8th and 9th sections of the act, ch. 19, of the year 1877, to credit complainant the full amounts of the taxes due under said act of 1877, for the years 1875, 1876 and 1877, out

of the $11,372 paid by complainant as the taxes due for 1875 and 1876, under the provisions of the 11th section of said act of 1875.

14 Complainant insists that, under the said 38th section of its original charter, its property was not subject to taxation for the years 1875 and 1876, and up to March 28, 1877, hence the attempt by the legislature, by the acts of 1875 and 1877, to impose taxation on its property for the years 1875, 1876 and 1877, was an attempt to impair the obligation of said contract, and illegal and void.

Complainant further avers, that, having accepted the 11th section of chapter 78 of the acts of 1875, that also exempted it from all taxation for ten years, other than the 1½ per cent. therein provided; and complainant avers that the act of 1877, ch. 19, in so far as it attempts or purports to repeal said 11th section, and impose other taxes on complainant's property than that prescribed in said 11th section, is an impairing of the obligation of complainant's contracts with the State, as embodied in said 11th section, and is therefore illegal, null and void. Said acts of 1875 and 1877, as above averred, violate the 10th section of the 1st article of the Constitution of the United States, forbidding any State to pass any law impairing the obligation of a contract, and is in violation of the same provision of the constitution of the State. Therefore complainant insists and avers that the

15 making of said assessment as aforesaid, and the reporting it to the comptroller, is an utterly illegal act, and invasion of its rights of property, and without warrant of law; that for the same reason, any attempt of the comptroller to ascertain the amounts wrongfully and illegally imposed by said acts as taxes due from complainant, for the years 1875, 1876 and 1877, to the State, and to pay them with $11,000 paid to the State by complainant under section 11 aforesaid, will be illegal, and in violation of the rights of complainant; so, too, any attempt by him to certify the amounts to be taxed to each county and town, as aforesaid, will be illegal and wrongful. Complainant is advised, and insists that the return of said assessment by the assessors to the comptroller, and his ascertainment of the amounts wrongfully imposed as taxes for 1875, 1876 and 1877, will be in the nature of and a quasi judgment, creating a lien on complainant's property, real and personal; and so, too, in the cases of the counties and towns, and hence said assessments being utterly void and illegal, should be prevented and restrained by order of this court. Complainant is also advised that to apply the 1½ per cent. on its gross earnings for 1875, 1876, (paid to the State under section 11,) to the liquidation of the illegal exactions, (by said acts imposed on complainant for the years 1875, 1876 and 1877,)

16 as the comptroller will do unless restrained by this court,

is an illegal and wrongful diversion of said sums, violative and destructive of the contract rights of complainant, and which cannot be redressed except by the injunctive power of the court.

Complainant further shows, that the injury to complainant's rights of property, by directing its payments of the 1½ per cent. to the satisfaction of said illegal exactions, will be irreparable, as no process or remedy can reach the State.

Complainant further insists, that the mode of enforcing these illegal exactions, by distress warrants, to be issued by the comptroller to the various sheriffs along the line of its road, to be levied on its real and personal property, will lead to a multitude of harassing suits, will obstruct most seriously, and hinder complainant in the discharge of its duties as a public carrier, and the exercise of its franchises, and produce to it irreparable injury, and cast a cloud upon the title to its property, real and personal. So, too, the efforts of the various counties and towns to collect these illegal exactions on their behalf, will lead to a multitude of suits, and to the same injuries above alleged, as to the
17 State's efforts to collect; and, moreover, these exactions by the counties and towns will, in the greater number if not in all cases, be under $500, and will thus deprive complainant of the right and privilege of an appeal to the courts of the United States to protect complainant against a statute of the State, impairing the obligation of its charter contract aforesaid.

Complainant further avers, that *that* 40 cents on the $100 worth of taxable property is the tax by law for the years 1875 and 1876, and 10 cents for 1877 and 1878; hence the $11,000 paid by complainant into the State treasury, as the 1½ per cent. on its gross earnings, under section 11, for 1875 and 1876, exceeds the entire taxes claimed by the State for the four years of 1875, '76, '77 and '78, by at least $4,000, and no tax at all is now due from complainant to the State. The 1½ per cent. on its gross earnings for the current year is not due, and cannot be ascertained, under section 11, until January, 1878, and complainant is perfectly willing to make report and pay the 1½ per cent., as provided in that, up to 1885, and insists on its right so to do.

The premises considered, complainant prays that the defendants named in the caption be made such by due process, and be required to answer according to the usual practice;
18 that defendants, Shearon, Ewing and Moses, be enjoined from reporting their assessment of complainant's property to the comptroller; that defendant, Gaines, be enjoined from receiving said report: and that he be enjoined from ascertaining on said valuations the amounts illegally imposed by said acts on complainant for the years 1875, '76, '77 and '78: that he be enjoined from diverting the said $11,000 paid under section 11,

aforesaid, to satisfaction of the illegal exactions imposed by said acts for 1875, '76 and '77; that he be enjoined from certifying to the said counties and towns the amounts to be taxed by them; that the enforcement of said acts by any of defendants, in any and every way, be enjoined; that on final hearing, your Honor will, by final decree, declaring the exemptions of complainant hereinbefore set up valid and binding as matters of contract under their charter and amendment with the State, and that the acts, chapter 78, of 1875, except section 11, and chapter 19, of 1877, are utterly null and void, because they impair the obligation of complainant's said contract, and are therefore in violation of the 10th section of the 1st article of the Constitution of the United States, and of the same provision of the constitution of the State.

Complainant prays for general relief. This is the first application for an injunction in this case. And, as in duty bound, complainant will ever pray, etc.

HUMES & POSTON,
Solicitors for Complainant.

19 STATE OF TENNESSEE,
Davidson County:

Personally appeared before me this day, W. Y. C. Humes, the solicitor of complainant, and made oath in due form of law, that the facts set forth in the foregoing bill, as of his own knowledge, are true, and those on information and belief, he believes to be true.

W. Y. C. HUMES.

Sworn to and subscribed before me, this 7th day of September, 1877.

A. D. CREIGHTON, (*J. P.*)

Exhibit "A."

Assessment of Memphis and Charleston Railroad by State board of assessors:

Total value for State taxation, $108\frac{40}{100}$ miles, at $6,652 per mile	$721,126.66
Total valuation for Shelby county taxation, $30\frac{34}{100}$ miles, at $6,652 per mile	201,835.68
Total valuation for Fayette county taxation, $40\frac{59}{100}$ miles, at $6,652 per mile	270,688.59
Total valuation for Hardeman county taxation, $25\frac{57}{100}$ miles, at $6,652 per mile	170,103.40
Total valuation for McNairy county taxation, $11\frac{80}{100}$ miles, at $6,652 per mile	78,499.02

Incorporated towns.

Total valuation for Memphis taxation, $5\frac{18}{100}$ miles, at $6,652 per mile	$34,459.74
Total valuation for Collierville taxation, $1\frac{24}{100}$ miles, at $6,652 per mile	8,249.05
Total valuation for Moscow taxation, $0\frac{80}{100}$ miles, at $6,652 per mile	5,321.96
Total valuation for Somerville taxation, $0\frac{38}{100}$ miles, at $6,652 per mile	2,527.93
Total valuation for La Grange taxation, $1\frac{95}{100}$ miles, at $6,652 per mile	12,972.29
Total valuation for Grand Junction taxation, $1\frac{95}{100}$ miles, at $6,652 per mile	12,972,29
Total valuation for Saulsbury taxation, $0\frac{75}{100}$ miles, at $6,652 per mile	4,856.29
Total valuation for Middleton taxation, $1\frac{7}{100}$ miles, at $6,652 per mile	7,118.13
Total valuation for Pocahontas taxation, $1\frac{20}{100}$ miles, at $6,652 per mile	7,982.95

20 Upon the complainant filing their bill, and giving security for the prosecution, as required by law, the clerk and master is hereby directed to issue an order restraining the defendants from doing the acts sought to be enjoined, until this case can be formally brought before me, by notice or otherwise, for hearing, upon an application for the injunction sought. This order is made by the consent of J. B. Heiskell, the attorney general and reporter for the State, September 7, 1877.

W. F. COOPER,
Chancellor.

NASHVILLE, *September* 6, 1877.

We, the undersigned, acknowledge ourselves securities for the prosecution of the above suit by the complainant to the amount $500 as costs.

W. Y. C. HUMES.

The restraining order of the 7th of September, 1877, heretofore made by me in this cause by consent of the attorney is hereby so modified as to permit the defendants, Shearon, Ewing, and Moses, to complete their duties as assessors, and to report their assessments to the comptroller; the former order to remain otherwise in full force.

W. F. COOPER,
SEPTEMBER 15, 1877. *Chancellor.*
Filed September 10, 1877, at 5 o'clock p. m.

STATE OF TENNESSEE.

To the sheriff of Davidson county, greeting:

We command you to summon James L. Gaines, comp-
21 troller of the State of Tennessee, Thomas R. Shearon, J. W. Ewing, and Frank A. Moses, railroad assessors for Tennessee, if to be found in your county, to appear before the chancellor of the chancery court at Nashville at the next court to be held at the court-house in Nashville on the first Monday in October, 1877, next, then and there to answer the original bill of complaint of the Memphis and Charleston Railroad Co. *vs.* J. L. Gaines, Comptroller, *et al.*, and further do and receive what our said court shall consider in that behalf; and this you shall in no-wise omit, under the penalty prescribed by law. Herein fail not, and have you then and there this writ.

Witness, Robert Ewing, clerk and master of our said chancery court, at office, in the court-house at the city of Nashville, this first Monday in April, 1877, and the 101st year of American independence.

ROBERT EWING,
Clerk and Master.
By T. W. WRENNE,
D. C. and M.

Issued September 15, 1877.

ROBERT EWING,
C. and M.

Came to hand the same day issued, and executed by reading and making known the tenor of this writ to James L. Gaines, comptroller, Thomas R. Shearon, and Frank A. Moses, and
22 delivered a true copy of the bill filed in this cause to the said Gaines; the said J. W. Ewing is not to be found in my county.

H. H. WILLIAMSON,
Deputy Sheriff.
HUMES and POSTON,
Solicitors for Complainant.

On the 19th November, 1877, the following proceedings were had:

MEMPHIS AND CHARLESTON R. R. Co.
vs.
JAMES L. GAINES, Comptroller, and others.

Be it remembered that this cause came on to be heard before the Hon. W. F. Cooper, Chancellor, etc., on this, the 19th day of November, 1877, upon the application of complainant for an injunction to enjoin the railroad tax assessors from reporting the

assessment of complainant's property to the comptroller, and to enjoin the latter functionary from certifying the valuations to the counties and incorporated towns through which the complainant, the Memphis and Charleston Railroad, runs, and from applying any of the moneys paid in under the acceptance of the 11th section of the act of 1875 in satisfaction of the new assessments made under the act of 1877.

And it appearing to the court that the complainant and other railroad companies complainant in like situation are entitled to the injunction as prayed, upon giving bond, with good
23 security, in the penalty of five thousand dollars, conditioned as required by law in injunction cases before judgment—

It is therefore ordered, adjudged, and decreed accordingly, and that all of the defendants be, and they are hereby, enjoined from enforcing or attempting in any manner to enforce said acts.

It is further ordered that the complainants have ten days from the date of this decree to execute the bond herein required.

To the Hon. W. F. COOPER, chancellor, presiding in the chancery court of Davidson county, Tennessee.

THE MEMPHIS AND CHARLESTON R. R. Co.
vs.
JAMES L. GAINES, State Comptroller.

Your petitioner, the Mobile and Ohio Railroad Company, respectfully shows and states that it was incorporated by act of the legislature of Tennessee, passed January 28, 1848, the same being chapter 118, and thereby empowered to construct, use, and maintain a railroad from Mobile, Alabama, through the State of Tennessee to some point on the Mississippi or Ohio river, near the mouth of the Ohio, and that section 11 of its original charter was in the words following, viz:

"Section 11. Be it enacted, that the capital stock of said company shall be forever exempt from taxation, and the road,
24 with all its fixtures and appurtenances, including workshops, warehouses, and vehicles of transportation, shall be exempt from taxation for the period of twenty-five years from the completion of the road, and no tax shall ever be laid on said road or its fixtures which will reduce the dividends below eight per cent."

That its said road was finally completed on the twenty-second day of April, 1861; that for many years petitioner has not been able to declare or pay any dividends whatever, and its condition now would not justify the declaring or paying any dividends of any per cent. whatever; that recently, in the year 1875, for the first time since its incorporation, the State of Tennessee and the

various counties, cities, and towns in said State through which petitioner's said road passes, have set on foot proceeding to levy, assess, and collect taxes on its said line of road and railroad property within their respective bounds for the years 1875–76–77. Petitioner further states that such attempted taxation of its said property is illegal and unjust; that its said charter and the eleventh section thereof was a contract between petitioner and the State of Tennessee, upon the faith of which, and of all its privileges and exemptions, and especially of the said eleventh section, petitioner was induced to and did expend large sums of money in constructing its line of railroad through the said State, and equipping and operating the same; that for more than twenty years the said State and counties, cities, and towns have, in good faith, abided by said contract, and attempted to levy no tax upon petitioner's said property: that their proceedings now, and any and all laws claimed to be authority for the same, are an impairment of the obligation of said contract, in conflict with the Constitution of the United States, and are wholly null and void. Petitioner further states and shows that on the 10th day of September, 1877, the Memphis and Charleston Railroad Company filed its bill in this court on behalf of itself and all other railroad companies in like situation which would come in by petition, and against James L. Gaines, State comptroller, for an injunction against said taxation, and it was stipulated and agreed by the counsel representing all of the interests in the said cause that any railroad company claiming exemption from such taxation, upon giving such bond as should be required by your Honor, might come in by petition, be made a party complainant to the suit, and its said claim of exemption adjudicated in the said cause.

Petition here adopts all the allegations of the said bill of the Memphis and Charleston Railroad Company with regard to the levy of such taxes, and all the proceedings taken, or about to be taken, for its assessment and collection, and as to the illegality and unconstitutionality thereof.

Petitioner further avers that their capital stock is $5,320,600, their bonded debt $12,046,667.05, and that they have never been able to pay the interest on their bonded debt, and no dividend has ever been declared amounting to eight per cent.; that it has not and did not take the benefit of the eleventh section of the act of 1875, nor any benefit under that act, and they claim total exemption from all taxation, under the provision of their charter, until the dividends reach eight per cent. and the expiration of the twenty-five years.

Wherefore, petitioner prays that it may be made a party complainant to said cause, and allowed to set up and show the illegality of the said taxes levied and attempted to be collected from it, and that such injunction be issued as to it as has been granted

to the said Memphis and Charleston Railroad Company, and for all such other further and general relief as may appear just and equitable as petitioner may be entitled to in the premises; and petitioner will ever pray.

HUMES & POSTON,
Attorneys for Petitioner.

Filed November 29, 1877.

27 To the Hon. W. F. COOPER, chancellor, presiding in the chancery court of Davidson county, Tennessee:

THE MEMPHIS AND CHARLESTON R. R. Co.
vs.
JAMES L. GAINES, State Comptroller, etc.

Your petitioner, the Knoxville and Charleston Railroad Company, respectfully shows and states that it was duly and legally incorporated by act of the legislature of Tennessee, passed February 18, 1852, and thereby given all the powers and privileges necessary for the construction and use of a railroad, either by double or single track, from the city of Knoxville, in the direction of Charleston, South Carolina, so as to form a continuous railroad connection between said cities; that by its said charter, it was invested with all the powers, rights and privileges, conferred on the Nashville and Chattanooga Railroad Company, in its original charter.

The original charter of the Nashville and Chattanooga Railroad Company was granted by act of the legislature of Tennessee, passed December 11, 1845, and the 38th section thereof, is in the words following, viz.:

"The capital stock of said company shall be forever exempt from taxation, and the road, with all its fixtures and appurtenances, including workshops, warehouses, and vehicles
28 of transportation, shall be exempt from taxation for the period of twenty years, from the completion of the road, and no longer."

The petitioner accepted its charter, and, relying upon the rights, privileges and exemptions, thereby given, and especially upon the said exemption from taxation, was induced to, and did expend large sums of money in the construction, equipment and operation of its said road, and has partially finished its road through the State of Tennessee, to wit: from Knoxville to Maryville: that petitioner's said road has not yet been completed in the State of Tennessee; that recently the State of Tennessee, and the several counties, cities and towns, through which petitioner's said route extends, have set on foot proceedings to assess and

collect taxes on said railroad; and that said attempted taxation is illegal and void.

Petitioner therefore prays that it may be made a party complainant to said cause, and allowed to set up and show the illegality of the said tax levied on and attempted to be exacted from it; and that such injunction be issued as to it has already been in the case of the Memphis and Charleston Railroad Company, and for all such other further and general relief as it may show itself entitled to, and petitioner will ever pray, etc.

HUMES & POSTON,
Attorneys for Petitioner.

Filed, November 29, 1877.

29 On 3d December, 1877, the following proceedings were had:

MEMPHIS AND CHARLESTON R. R. Co.
vs.
JAMES L. GAINES, Comptroller, and others.

In this cause, it appearing to the Court that on the 10th day of September, 1877, the Memphis and Charleston Railroad Company filed its bill in this Court on behalf of itself and all other railroad companies in like situation, which would come in by petition, and against James L. Gaines, State comptroller, and others; and that upon application of complainant, on a former day of this present term of court, an injunction was granted, enjoining the defendant, James L. Gaines, comptroller, from certifying the State railroad tax assessors' valuations of complainant's property to the counties and incorporated towns through which the said Memphis and Charleston Railroad runs, and from applying any of the moneys paid in under the acceptance of the 11th section of the acts of 1875, in satisfaction of the new assessments made under the acts of 1877; and all of the defendants, from enforcing or attempting in any manner to enforce said acts.

And it further appearing to the Court that the Paducah and Memphis Railroad Company, the Mobile and Ohio Railroad Company, and the Knoxville and Charleston Railroad Company,
30 presented their petitions to the Court, claiming, under their respective charters, exemption from the taxes imposed upon their property by virtue of said acts, and praying to be allowed to become parties complainant to this suit on the usual term, and for such injunction to issue as to them, as has already been granted to the complainant, the Memphis and Charleston Railroad Company.

And it appearing to the Court that the petitioners are entitled to become parties complainant to this suit, and that they are also

entitled to the injunction, as prayed in their petitions and in the original bill, upon each of said petitioners giving bond, with good security, in the penalty of five thousand dollars, conditioned as required by law, in injunction cases, before judgment.

It is, therefore, ordered accordingly.

It is further ordered, that petitioners have 'till the 5th day of December, 1877, to execute the bonds herein required.

STATE OF TENNESSEE:

To Thomas R. Shearon, J. W. Ewing, Frank A. Moses, tax commissioners and assessors, and James L. Gaines, comptroller of the State of Tennessee, and to their counsellors, attorneys, solicitors and agents, and each and every one of them—greeting:

Whereas, in a certain suit this day instituted in our court of chancery, at Nashville, by the Memphis and Charleston
31 Railroad Company, complainant, against James L. Gaines, comptroller, and *al.*, defendants, the complainants having obtained from Hon. Wm. F. Cooper, chancellor, a fiat for a restraining order to issue, enjoining and restraining you and each of you, as follows: Said Shearon, Ewing, and Moses, be enjoined from reporting the assessment and valuation of the Memphis and Charleston Railroad Company and its property, to said Gaines, comptroller, &c., from receiving said assessments and valuations, and from ascertaining on said valuation the amount of taxes due the State for the years, 1875, 1876, 1877, and 1878; also, from certifying to any county or incorporated town through or by which said railroad runs, the amount to be taxed by said towns or counties; and the complainant having executed the bond required by said fiat, we, therefore, in consideration of the premises aforesaid, do strictly enjoin and command you, the said Thomas R. Shearon, J. W. Ewing, Frank A. Moses, tax commissioners, and James L. Gaines, comptroller, &c., and all and every persons before mentioned, under the penalty prescribed by law, of your and every of your goods, lands, and tenements, to be levied to our use, that you and every of you do absolutely desist from doing either of the acts mentioned above and herein forbidden until hearing of this cause, in our said court of
32 chancery.

Witness, Robert Ewing, clerk and master of our said court, at office, the first Monday in September, in the year of our Lord one thousand eight hundred and seventy-seven, and in the 101st year of our Independence.

ROBERT EWING,
Clerk and Master.

By T. W. WRENNE,
Deputy Clerk and Master.

Issued September 10, 1877.

ROBERT EWING,
C. and M.

Came to hand, September 10, 1877, and executed by reading to James L. Gaines, comptroller, &c., J. W. Ewing, and Francis Moses, commissioners, September 11, 1877; executed by reading to Thomas R. Shearon, September 15, 1877.

H. H. WILKINSON,
D. Sheriff.

HUMES & POSTON,
Solicitors for Complainant.

STATE OF TENNESSEE:

To Thomas R. Shearon, Z. W. Ewing, and Frank A. Moses, railroad tax assessors, for the State of Tennessee, and James L. Gaines, comptroller of said State, and to their counsellors, attorneys, solicitors and agents, and each and every one of them—greeting:

Whereas, in a certain suit instituted in our court of chancery, at Nashville, by the Memphis and Charleston Railroad
33 Company, complainant, against James L. Gaines *et al.*, defendants, the complainant having obtained from Hon. Wm. F. Cooper, chancellor, an order for a writ of injunction to issue, to enjoin the said Thomas R. Shearon, Z. W. Ewing, and Frank A. Moses, railroad tax assessors aforesaid, from reporting the assessment and valuation of the Memphis and Charleston Railroad Company and its property to said Gaines, comptroller, etc., and to enjoin the said Gaines from certifying the valuations to the counties and incorporated towns through which the Memphis and Charleston Railroad runs, and from applying any of the moneys paid under the acceptance of the eleventh section of the acts of 1875, in satisfaction of the new assessments made under the acts of 1877, all as set out in the decree of said court, rendered in this cause, November 19, 1877, which is here referred to and made part of this writ, and the complainant having executed the bond required by said fiat,

We, therefore, in consideration of the premises aforesaid, do strictly enjoin and command you, the said Thomas R. Shearon, Z. W. Ewing, and Frank A. Moses, assessors aforesaid, and James L. Gaines, comptroller, etc., and all and every persons before mentioned under the penalty prescribed by law, of your and every of your goods, lands and tenements, to be levied to our use,
34 that you and every of you do absolutely desist from doing any of the acts herein forbidden, until hearing of this cause in our said court of chancery.

Witness, Robert Ewing, clerk and master of our said court, at office, the first Monday in October, in the year of our Lord one thousand eight hundred and seventy-seven, and in the 102d year of our Independence.

ROBERT EWING,
Clerk and Master.
By T. W. WRENNE,
Deputy Clerk and Master.

Issued November 26, 1877.

ROBERT EWING,
C. and M.

Came to hand same day issued, and executed on R. L. Campbell, clerk of Gaines, by making known to him contents of within process; none of the other within named parties to be found in my county.

M. STRATTON, JR.,
Deputy Sheriff.
HUMES & POSTON, and
S. J. HENDERSON,
Solicitors for Complainant.

STATE OF TENNESSEE:

To James L. Gaines, comptroller, etc., of the State of Tennessee, and to his counsellors, attorneys, solicitors and
35 agents, and each and every one of them—greeting:

Whereas, in a certain suit instituted in our court of chancery, at Nashville, by the Knoxville and Charleston Railroad Company, complainant, against James L. Gaines *et al.*, defendants, the complainant having obtained from Hon. Wm. F. Cooper, chancellor, an order for a writ of injunction to issue, to enjoin the said Gaines, comptroller, etc., from certifying the amount and valuation of the Knoxville and Charleston Railroad Company, its property, etc., made by Z. W. Ewing, T. R. Shearon, and Frank A. Moses, railroad assessors for said State in 1877, to the counties and incorporated towns through which it runs, and also to enjoin said Gaines, comptroller, etc., from applying any of the money paid under the acceptance of the 11th section of the act of 1875, in satisfaction of the new assessments made under the act of 1877, and the complainant having executed the bond required by said order,

We, therefore, in consideration of the premises aforesaid, do strictly enjoin and command you, the said James L. Gaines, comptroller, etc., and all and every persons before mentioned, under the penalty prescribed by law, of your and every of your goods, lands and tenements, to be levied to our use; that
36 you and every of you do absolutely desist from doing any of the acts herein forbidden until hearing of this cause, in our said court of chancery.

Witness, Robert Ewing, clerk and master of our said court, at office, the first Monday in October, in the year of our Lord one thousand eight hundred and seventy-seven, and in the 102d year of our Independence.

ROBERT EWING,
Clerk and Master.
By T. W. WRENNE,
Deputy Clerk and Master.

Issued December 5, 1877.

ROBERT EWING,
C. and M.

Came to hand same day issued, and executed by making contents of within process known to James L. Gaines, comptroller, etc., of the State of Tennessee.
December 6, 1877.

M. STRATTON, JR.,
Deputy Sheriff.
HUMES & POSTON, and
S. J. HENDERSON,
Solicitors for Complainant.

Injunction bond for Memphis and Charleston R. R. Co.

Know all men by these presents: That we, the Memphis and Charleston Railroad Company, principal, and C. M. McGhee, and James G. Mitchell, sureties, are held and firmly bound
37 unto the State of Tennessee, for the use of James L. Gaines, comptroller of said State, Thomas R. Shearon, Z. W. Ewing, and Frank A. Moses, railroad assessors for said State, in the penal sum of five thousand dollars, for which payment, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, administrators, jointly and severally, by these presents. Signed and dated this 22d day of November, in the year of our Lord, one thousand eight hundred and seventy-seven.

The condition of the above obligation is such that, whereas the Memphis and Charleston Railroad Company prayed for and obtained from the court of chancery, holden at Nashville, in the State of Tennessee, on November 19, 1877, an order for a writ of injunction against James L. Gaines, comptroller, and the other obligees herein named, returnable to the chancery court, holden at Nashville, on the first Monday in April, 1878, next, to enjoin the said Thomas R. Shearon, Z. W. Ewing, and Frank A. Moses, railroad tax assessors aforesaid, from reporting the assessment and valuation of the Memphis and Charleston Railroad Company, and its property to said Gaines, comptroller, and to enjoin the

said Gaines from certifying the valuations to the counties and incorporated towns through which the Memphis and Charleston Railroad runs, and from applying any of the moneys
38 paid under the acceptance of the eleventh section of the acts of 1875, in satisfaction of the new assessments made under the act of 1877, all as set out in the bill and fiat here referred to, and made a part of this bond.

Now, if the said Memphis and Charleston Railroad Company shall well and truly pay all such costs and damages as shall be awarded by the chancery court on dismissing the bill, and pay such costs as the court may order, then the above obligation to be void, otherwise to remain in full force and effect.

MEMPHIS AND CHARLESTON R. R. CO., [L. S.]
By C. M. McGEHEE, *V. P.*, [L. S.]
C. M. McGEHEE, [L. S.]
JAMES G. MITCHELL, [L. S.]

I do hereby certify that C. M. McGehee and James G. Mitchell, whose genuine signatures appears to this bond, are amply good and sufficient for more than the penalty of this bond.

Given under my hand and seal of said office of clerk and master, at Knoxville, Tenn., November 22, 1877.

M. L. PATTERSON,

Filed November 24, 1877. *C. and M.*

Injunction bond for Knoxville and Charleston R. R. Co.

Know all men by these presents, that we, the Knoxville
39 and Charleston Railroad Company, principals, are held and firmly bound unto the State of Tennessee, for the use of James L. Gaines, comptroller, &c., in the penal sum of five thousand dollars, for which payment well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors or administrators, jointly and severally, by these presents.

Signed and dated the — day of ———, in the year of our Lord one thousand eight hundred and seventy-seven.

The condition of the above obligation is such, that whereas, the Knoxville and Charleston Railroad Company, the day of the date hereof, prayed for and obtained from the court of chancery, holden at Nashville, in the State of Tennessee, a fiat for a writ of injunction against James L. Gaines, comptroller, &c., and returnable to the chancery court, holden at Nashville, on the first Monday in April, in 186[7]8, next, to enjoin the said James L. Gaines, comptroller, &c., from certifying the assessment and valuation of the Knoxville and Charleston Railroad Company, its property, &c., to the counties and incorporated towns through

which it runs; also to enjoin said Gaines, comptroller, &c., from applying any of the money paid under the acceptance of the 11th section of the act of 1875, in satisfaction of the new assessment, made under the act of 1877, all as set out in the bill and
40 order here referred to and made a part of this bond.

Now, if the said Knoxville and Charlestown Railroad Company shall pay all damages and costs, or perform the decree of the court, in case the injunction is dissolved, and also pay such damages as may be sustained by the wrongful suing out of the injunction, and shall pay such costs as the court may order, then the above obligation to be void, otherwise to remain in full force and effect.

KNOXVILLE & C. R. R.,
By THOS. O'CONNER, *Pres't*, [L. S.]
THOMAS O'CONNER, [L. S.]
WM. MORROW, [L. S.]

Filed Dec. 5, 1877.

Injunction bond for Mobile and Ohio R. R.

Know all men by these presents, that we, the Mobile and Ohio Railroad Company, and B. F. Wilson, surety, are held and firmly bound unto the State of Tennessee for the use of James L. Gaines, comptroller, etc., in the penal sum of five thousand dollars, for which payment well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors or administrators, jointly and severally, by these presents.

Signed and dated this 10th day of December, in the year of our Lord one thousand eight hundred and seventy-seven.

41 The condition of the above obligation is such that whereas the Mobile and Ohio Railroad Company, on the — day of ———, prayed for and obtained from the court of chancery holden at Nashville, in the State of Tennessee, an order for a writ of injunction against James L. Gaines, comptroller, etc., returnable to the chancery court holden at Nashville, on the first Monday in April, 1878, to enjoin the said James L. Gaines, comptroller, etc., from certifying the assessments and valuation of the Mobile and Ohio Railroad Company, its property, etc., to the counties and incorporated towns through which it runs, and also to enjoin said Gaines, comptroller, etc., from applying any of the money paid under the acceptance of the eleventh section of the act of 1875, in satisfaction of the new assessments made under the act of 1877, all as set out in the bill and fiat here referred to and made a part of this bond.

Now, if the said Mobile and Ohio Railroad Company shall pay all damages and costs, or perform the decree of the court, in case the injunction is dissolved, and also pay such damages as may be

sustained by the wrongful suing out of the injunction, and shall pay such costs as the court may order, then the above obligation to be void, otherwise to remain in full force and effect.

MOBILE AND OHIO R. R. CO. [L. S.]
By S. J. HENDERSON, [L. S.]
Solicitor.
W. B. DUNCAN, [L. S.]
Receiver.
By S. J. HENDERSON, [L. S.]
Solicitor.
B. F. WILSON, [L. S.]

Filed December 10, 1877.

42 *Deposition of A. L. Rives.*

THE MEMPHIS AND CHARLESTON R. R. Co.
vs.
J. L. GAINES *et al.*

STATE OF ALABAMA,
County of Mobile:

Personally appeared before me, A. L. Willoughby, a notary public for the county and State aforesaid, and residing in the city of Mobile, A. L. Rives, attorney and agent in fact for W. Butler Duncan and A. F. Elliott, trustees and receivers of the Mobile and Ohio Railroad, also general manager of said road, who, being duly sworn by me, on oath, say, that Mobile and Ohio Railroad Company has never declared a dividend of eight per cent. to its stockholders; that the amount of stock along the whole length of said road is five millions three hundred and twenty thousand six hundred dollars; that the total amount of the bonded debt of said road is twelve millions forty-six thousand six hundred and sixty-seven dollars and five cents; that neither the Mobile and Ohio Railroad Company, while in possession of said road, nor the said receivers, since their possession of the same, have ever accepted the benefit of the provisions contained in section 8 of the act of the Tennessee legislature approved March 20, 1875, nor the provisions of any other act of said
43 legislature, by which they waived, or intended to waive, their right to exemption from taxation, as conferred in the eleventh section of the charter granted to the Mobile and Ohio Railroad Company February 28, 1848; that the Mobile and Ohio railroad was completed April 22, A. D. 1861.

A. L. RIVES,
A. and A. and G. M.

Sworn to before me this twelfth day of January, A. D. 1878.
ALONZO L. WILLOUGHBY,
Notary Public, Mobile County, Ala.

We consent to the reading of this affidavit as the deposition of A. L. Rives.

HUMES & POSTON,
J. B. HEISKELL.

January 15, 1878.
Filed January 16, 1878.

Agreement of Counsel as to Facts.

MEMPHIS AND CHARLESTON R. R. Co.
vs.
JAMES L. GAINES, Comptroller, et al.

In Chancery Court of Davidson county, Tenn.

The following argument of facts is entered into in lieu of proofs, and to save expense and the cost of transcripts:

44 *First.* It is agreed that the statutes referred to in the bill herein, as embracing the original charters of the various railroads herein, and all acts amendatory thereof, as embodied in the printed statutes of the State appertaining to the various railroads in the State interested in this controversy, may be read in lieu of certified copies, both in this court and the supreme court of the State or the United States, if this cause is carried to either of said last named courts.

Second. It is agreed that the Memphis and Charleston railroad was completed on the twenty-eighth day of March, 1857.

Third. It is agreed that the Memphis and Charleston and the Northern Central and St. Louis railway have accepted the provisions of the eleventh section of the act of March 20, 1875, providing for and prescribing the mode and manner of valuing the property of the railroads in the State for taxation, with all the terms and conditions therein imposed, and have paid into the treasury of this State the one-half per cent. upon its gross earnings for the years 1875 and 1876, as provided for in said section 11 of said act; but that the Mobile and Ohio railroad have not accepted the provisions of the same, or any other act of similar import.

45 *Fourth.* It is further agreed that the Memphis and Charleston Railroad Company, within the time allowed by law, entered its protest and exceptions to the assessment as made by the said railroad assessors under the third section of the act of March 20, 1877, together with the proofs adduced in support thereof, and filed the same with said assessors, and that such exceptions and protest were, in the main, the same matter of complaint now relied upon in the bill herein.

Fifth. It is agreed that the assessment as made by said assessors against the Memphis and Charleston railroad is correctly set out

in exhibit A to the bill. No objection is made to the valuation as made.

J. B. HEISKELL,
Attorney General for the State of Tennessee.
HUMES and POSTON,
for Complainants.

Filed January 16, 4878.

Demurrer filed Jan'y, 23, 1878.

MEMPHIS AND CHARLESTON R. R. Co.
vs.
JAMES L. GAINES & als.

46 And the said defendants by protestation, &c., and say that they ought not, by reason of anything in the said bill contained, to be required to answer the same otherwise than by demurrer, and therefore they demur and show for cause—

1st. That there is no equity in the bill.

2nd. That upon the state of facts therein stated the complts. are entitled to no relief.

3rd. That as to the M. & C. R. R. Co. they do not pretend that they are now entitled to exemption further or longer under their original charter, and that the new supposed contract under which they claim relief is not valid or obligatory upon the State.

4. That as to the other said roads they do not show charters that entitle them to exemptions or immunities granted to the roads to whose charters they refer to define their charter, and they are not entitled to the same under any provisions in their said charters.

5th. That as to the Mobile & Ohio R. R. Company no reason is shown to bring it within the exemption of its own charter.

6. That the exemption of the Memphis and Charleston railroad by reference to which the other said company claims has long since expired and with its expiration the supposed claim of the complts. has been lost and determined.

47 For these and other reasons to be shown in argument defendants pray that they may be discharged with their reasonable costs.

J. B. HEISKELL,
Atty. Gen'l, for the Defts.

Decree February 4, 1878.

THE MEMPHIS & CHARLESTON R. R. Co. & others
vs.
JAMES L. GAINES & others.

This cause coming on to be heard on the demurrer of defend-

ants to the bill and several petitions filed thereunder this the 1st day of February, 1878, the court is of opinion that, as to the Memphis and Charleston R. R. Co., the demurrer of the defendant is too broad, and that as to so much of the bill as seeks relief against any collection by the State the same is not well taken, and disallows the same, and gives the defendants leave to answer over. As to the petition of the Mobile & Ohio R. R. Co., the court is of opinion that the demurrer is not well taken, and the said road being alleged to be exempt from any taxation for twenty-five years from the completion of the same, and disallows the demurrer as to the said Mobile & Ohio R. R. Co., and gives leave to defendants to answer over.

As to the Knoxville & Charleston R. R. Co., the court is of opinion that the same is not exempt from taxation, and that
48 the demurrer is well taken; the same is therefore allowed, and the petition is dismissed, and the defendants will recover of the complainant and their security the costs of this cause on their behalf expended, and the injunction heretofore granted is hereby dissolved as to said company.

As to the Paducah & Memphis R. R. Co., the said company appeared by their solicitors, and on their motion the petition of said road is dismissed, and the defendants will recover of the complainants and their securities the costs of this case in their behalf expended, for which execution may issue.

And thereupon came the defendants by the Attorney General of the State, and prayed several appeals from so much of the said decree as overrules the said demurrer as to the said M. & C. R. R. Co., and as to the said M. & O. R. R. Co. to the Supreme Court now sitting, which the court is pleased to grant without bond.

And the complainants in the matter of the Knoxville and Charleston R. R. Co. pray an appeal to the said Supreme Court now sitting, whch is granted to them upon their giving bond within twelve days from the date of this decree in the sum of $500 for costs and damages conditioned as required by law.

Appeal bond filed February 9, 1878.

Know all men by these presents, that we, the Knoxville
49 & Charleston Railroad Company, principal, and W. Morrow, security, are held and firmly bound unto James L. Gaines, comptroller, &c., or his certain attorney, executors, administrators, or assigns, in the penal sum of five hundred dollars; for the true payment thereof we bind ourselves, our heirs, executors, and administrators firmly by these presents. Signed and dated this 8th day of February, 1878.

The condition of the above obligation is such that whereas the above bound the Knoxville & Charleston Railroad Company have

prayed for and obtained an appeal from the chancery court at Nashville for Davidson county to the Supreme Court of this State at its next term, to be held at Nashville, in the State of Tennessee, from a decree rendered by said chancery court at Nashville at its special term, 1878, in the case of

THE MEMPHIS & CHARLESTON RAILROAD CO. & als.
vs.
JAMES L. GAINES, Comptroller, &c.

Now, if the said Knoxville & Charleston R. R. Co. shall well and truly prosecute its said appeal with effect, or in case it fail therein, pay and satisfy the whole debt, damages and costs, which may be awarded against it for wrongfully prosecuting said
50 appeal, and satisfy the judgment of said Supreme Court thereon, then the above obligation to be void, else to remain in full force and effect.

THOS. O'CONNER,
Prest. K. & C. R. R.
By S. J. HENDERSON, *Solr.*
W. MORROW, *Security.*

STATE OF TENNESSEE,
Davidson County:

I, Robert Ewing, clerk and master of the chancery court for said county and State, here certify that the foregoing transcript contains a full, true and perfect copy of all the record papers and proceedings had and filed in said court in the cause wherein the Memphis and Charleston Railroad Company is complainant and James L. Gaines and others are defendants, as the same are specially named in the index to said transcript, all as the same appears of record and on file in my office.

In testimony whereof I hereunto set my hand and affix the official seal of said court, at office at the court house
[SEAL] at Nashville, this 18th day of February, 1878, and the 102nd year of American independence.

ROBERT EWING, *Clerk & Master.*
By T. W. WRENNE, *D. C. & M.*

51 State tax $5 00
Co. do 2 50
ROBERT EWING, *C. & M.*

Bill, 25; afft., 25; pros. bond, 25; ent. sec., 25; reg. bond, 25 ..... $1 25
Inj'n., 1.00; spa., 75; (4) copy bill, 21.00; notice, 25; inj'n. bonds, ... 23 00
50; reg. bond, 50; ent. sec., 50; inj'n., 1.00; petition of 2 50
K. & C. Rd., 25; pros. bond, 25; ent. sec., 25;

reg	75	
bond, 25; petition of M. & O. Rd. Co., 25; bonds of	50	
K. & C. Rd., 50; ent. sec., 50; reg. bond, 50	1 50	
Bonds under petition of M. & O. Rd. Co., 50; ent. sec., 50	1 00	
reg. bonds, 50; inj'n. under petition of M. & O. Rd., 1.00	1 50	
Inj'n under petition of K. & C. Rd., 1.00; filing exhibit	1 00	
To O bill, 25; filing statement of facts, 25; filing	50	
Dep. of Rives, 25; demurrer, 25; copying	50	
Bonds, 2.25; comparing record for trial, 3.00;	5 55	
Ruler, 2.40; decrees (7–207), 50; (7–264), 50;	3 40	
(7–337), 2 5;(7–404), 1.00; ord. c., 1.00; appeal Bond, 50; transcript, 13.00; ctf. & seal, 75; ent. cost, &c., 75	15 00	59 90
H. H. Wilkinson, D. S., 4 inj'n., 3 spas., 1 non est		7 25
Tim Johnson, D. S., 1 inj'n		1 00
M. Stratton, Jr., D. S., 2 " 3 non ests		2 75
M. C. Cotton, S. D. S., 4 notices		2 00
Total		$80 40

52 THE MEMPHIS & CHARLESTON R. R. Co. & others
vs.
JAMES L. GAINES, Comptroller, et al.

The facts arising the question to be fully set forth in the written opinion of the chancellor.

The first question is the proper construction of the 38th section of the charter of the Memphis and Charleston R. R. Co., in the following words, to wit: "The capital stock of said company shall be forever exempt, and the road, with all its fixtures and appurtenances, including workshops, warehouses and vehicles of transportation, shall be exempt from taxation for the period of twenty years from the completion of the road, and no longer."

The argument of the company is, that the term "capital stock" has by the authorities a well defined legal signification. That is the sum of money fixed by the charter and subscribed by the stockholders as the basis of the business of the corporation and the means of conducting its operations, and whatever this money may be invested in still represents the capital stock, and the exemption of the "capital stock" will exempt any property of the corporation in which it may be invested. And so far as
53 the capital stock may have been invested in the road with its fixtures and appurtenances, workshops and warehouses

and vehicles of transportation, the same must remain forever exempt under the first clause of the above section, forever exempting the capital stock, and it is only such part or proportion of the above named property as may have been purchased or paid for with means other than the capital stock that is subject to taxation after the expiration of twenty years from the completion of the road. Upon this construction, and only upon this construction, it is said, can the provisions of the above section be reconciled and effect given to both clauses.

That the term "capital stock" in general has the meaning contended for, as distinguished from the shares of stock of the stockholder, is well established by authority, and it may be furthermore conceded that had the 38th section contained the provision forever exempting the capital stock *without more*, that this exemption would extend to and confer any property representing the capital stock, as the road itself and fixtures.

But we think there is no escape from the conclusion, under the clear and definite language of the latter clause of this
54 section, that the road, with all its fixtures and appurtenances, including workshops, warehouses, and vehicles of transportation, no matter how acquired or with what money paid for, are exempt only for the period of twenty years from the completion of the road. Exemptions to be allowed must be stipulated for in clear and unmistakable terms, construing this as a contract, and having in view the intention of the contracting parties, we think this provision could not have been otherwise understood.

Now, upon the assumption that the term "capital stock" must in this section be confined in its meaning, as argued by complainant's counsel, and further that this "capital stock" is now invested in the road and appurtenances, then it is clear that if the road and appurtenances are taxed after twenty years, that the provisions for the perpetual exemption of the capital stock is defeated. Whether this result may be avoided by giving in this instance some other meaning to the term "capital stock," or whether there be anything upon which the exemption may operate after the road and appurtenances are taxed, we need not undertake to determine or even surmise. We hold simply that whatever may be the meaning of this section in other
55 respects, or whatever uncertainty attaching to it, one thing is clearer than any other, and that is that the road, with all its fixtures and appurtenances, including workshops, warehouses, and vehicles of transportation, no matter how acquired or paid for, is exempt from taxation only for the period of twenty years from the completion of the road. We deem it unnecessary to review the authorities referred to by complainant's counsel. It is sufficient to say, while we may concede the general principle

contended for, and which it is insisted these authorities establish, they have produced no case on this side of the question which, in our opinion, is parallel to this.

The next question is whether the company is entitled to exemption from the taxes now claimed by reason of having accepted as an amendment to its charter the 11th section of the act of 1875.

This court decided this section unconstitutional in the case of Ellis *vs.* The Louisville and Nashville R. R., so far at least as applied to roads having no exemption at the time the act was passed, and we refer to the opinion in that case, delivered at a former term, for a decision of this general question.

The only difference between that case and the present
56 is that in that case the Louisville and Nashville R. R. Co. claimed the time the act was passed no exemption upon the particular road sought to be taxed, but did claim an exemption as to the other roads owned and operated by the company in this State, and proposed to waive these exemptions and accept the benefits of said 11th section of the act of 1875 as to all of said roads.

In the present case the Memphis and Charleston R. R. Co. did claim an exemption of the passage of the act, and, according to our construction of their charter, did have an exemption of the property now sought to be taxed extending some two years from that date; and the question is whether the legislature had the power, in consideration of the release by the company of this exemption for two years, to stipulate that the taxes upon the property of the company should [be] 1½ per cent. upon their gross income for the term of ten years.

The principle of the decision in the case of Ellis *vs.* The Louisville and Nashville R. R. Co. is that under the constitution of 1870 it [is] imperative upon the legislature to tax all property
not subject to exemption, according to its value, and
57 according to an equal and uniform rate; and that the 11th section of the act of 1875 did not do this, but proposed to substitute as to railroads an entirely different mode of taxation, and one not authorized. It is true the constitution did not and could not impair the validity of charter exemptions previously granted and valid under the constitution in force at the time, and as to such exempted property during the time of its exemptions the legislature was not forbidden to act. But we hold that the property of this railroad company, upon the expiration of the exemption, would come under this positive mandate of the constitution, requiring it from that time to be taxed equally with other property and according to its value, and the legislating upon this question two years in advance of the time when the property was to become subject to taxation. The release of the

exemption for the remaining two years might be a good consideration for a different stipulation for taxation, and being the same period, and in respect to that period the legislature might have the power to act, but the mode of taxing this property for the remaining eight years embraced by the 11th section of the act of 1875 could not be changed from the mode so im-
58 peratively demanded by the constitution of 1870. If so, the legislature, by acting one month in advance of the time the exemption would expire, and in consideration of the release of this exemption of one month, might defeat the provision of the constitution for an indefinite period, or perpetually.

We hold the act in question unconstitutional, and its acceptance no protection to the complainant.

For a further decision of the question we refer and adopt the opinion of the chancellor. It is perhaps also a question of doubt whether the 11th section of the act of 1875, regarding it as the charter amendment, is not also in violation of section 19, act 2, of the constitution of 1870, and of act 11, sec. 8.

But these, not having been discussed, are not decided, as the other is conclusive.

The result as to the Memphis & C. Co. is that according to the allegation of the bills the road, fixtures, and appurtenances, *including workshops*, warehouses, and vehicles of transportation, are exempt from taxation until the expiration of twenty years from the completion of the road, or until the 28th March, 1877, and the assessment of said property previous to that time is
59 illegal, and as no question has been made as to the form of the remedy, the demurrer, to this extent, should be overruled, but so far as the taxation after that date was contemplated, the relief sought by the bill should be denied.

The Mobile and Ohio Railroad Co. has in its charter a section providing, that the capital stock of said company shall be forever exempt from taxation, and the road, with all its fixtures and its appurtenances, including workshops, warehouses and vehicles of transportation, shall be exempt from taxation for the period of twenty-five years from the completion of the road, and no tax shall ever be levied on said road or its fixtures which shall reduce the dividends below eight per cent.

It is alleged in the bill that the road was completed on the 2d April, 1861. All that we need at present decide is that upon this allegation the twenty-five years not having expired, the property mentioned is not yet subject to taxation; what question may arise upon the expiration of the twenty-five years we need not now consider. As to this company, the demurrer should be overruled.

60 The remaining question arises upon the charter of the Knoxville and Charleston R. R. Co., containing these

words: Said company is hereby invested, for the purpose of making and using said road, with all the powers, rights and privileges, and subject to all the liabilities and restrictions that have been conferred and infused in the Nashville and Chattanooga R. R. Company in its original charter. The question is, whether this is sufficient to clothe the company with the immunity from taxation contained in the charter of the N. & C. Railroad Company?

We held that such language was not sufficient in a case almost precisely similar to this.

The case of the Mississippi & Tennessee R. R. Co. we also held against the exemption in the case of Hamblin County *vs.* The East Tennessee & Va. Railroad, which was a stronger case in favor of the exemption than this. Here the company is vested, "for the purpose of making and using said road," with the powers, rights and privileges of the former company.

In the case referred to the new company was vested with all the rights, powers and privileges of the former company, without the apparently qualifying words, "for the purpose of making and using said road."

61

We held that the words "rights and privileges" did not embrace an exemption from taxation. We are asked to reconsider this question, in view of the decision of the Supreme Court of the United States, to which our attention was not then called. This being a question where the Supreme Court of the United States has revisory jurisdiction, it is our duty to conform our decisions to the ruling of that tribunal, and we should cheerfully do so, in this instance, if satisfied that the question had been considered and directly decided; but upon looking to the cases referred to, it seems to us that this question was *taken* for *granted*, and not directly made or considered. The case apparently bearing more directly upon the question in Humphreys *vs.* Puques, 16 Wallace.

We frankly admit, as we did in the former case, that the words "rights and privileges" by a liberal or probably a fair construction might be held to include an exemption from taxation, as an exemption may be said to be both a right and a privilege, and there are plausible reasons for supposing that the legislature intended to adopt this former charter entire; but

62

starting out with the rule of construction settled by all the authorities, that an exemption cannot be allowed unless explained in the clearest language, and that all doubts must be resolved against either, then as rights and privileges as used in charters do not necessarily include exemptions, but may have full meaning given to the terms by referring them to other rights and privileges granted in charters, and further bearing in mind that our constitution was in reference to the passing of special laws, the words rights and privileges, immunities or exemptions, apparently at-

taching to such word a separate and distinct meaning, we conclude that a grant of the "rights and privileges" of another charter does not necessarily include the exemptions from taxations, and not being necessarily included does not pass. See also Morgan *vs.* Louisiana, 3 Otto. We conclude, therefore, to adhere to our former determination of this question. The company is not without remedy if we are in error. As to this company the demurrer will be sustained.

McFARLAND, *J.*

63 Be it remembered, that at a supreme court of errors and appeals, begun and held at the Capitol, in the city of Nashville, on the first Monday in December, A. D. 1877, it being the 3d day of December, 1877, for the 5th, 6th, 7th, 8th, 9th, 10th, 11th, and part of the 16th judicial circuits—Present: the Hon. Chief Justice, James W. Deaderick, and Associate Justices John L. T. Sneed, Thomas J. Freeman, Peter Turney, and Robert McFarland, when the following proceedings were had, to wit:

March 12, 1878.

THE MEMPHIS AND CHARLESTON R. R. Co.
vs.
JAMES L. GAINES, Comptroller. } Davidson Eq. D'k't.

These causes came on to be heard on the 9th day of March, 1878, on the transcript of the record from the chancery court at Nashville, and it appearing to the court that the Memphis and Charleston R. R. Co. on the matters set out and alleged in the bill is entitled to relief to the extent of enjoining the comptroller of the State from sending out any assessments of the said road for collection to the several counties and towns through which it runs for taxes accruing previous to the 28th day of March, 1877, the court decreeing said road exempt from all taxation previous to that date under the provisions of its charter, but that from said date its road, with all its fixtures and appurtenances, including shops, warehouses, and vehicles of transportation, shall

64 be subject to taxation at same rates [of] valuation as other property in the State.

It therefore orders and decrees that the injunction heretofore granted herein as to so much of said taxes as accrued against the Memphis and Charleston Railroad Company prior to the 28th day of March, 1877, be retained and be made perpetual and final, and that as to all other matters appertaining to said road that the bill be dismissed.

And it appearing that the Mobile & Ohio R. R. Co. is by its charter exempt from all taxation for (25) twenty-five years from its completion, and that the said time has not yet expired, the court so adjudges and decrees.

It is therefore ordered and decreed that the demurrer so far as

applicable to said road be disallowed, and the injunction made perpetual; but the court makes no decision as to the claim of said railroad under the provisions of its charter that dividends are not to be reduced by taxation below eight per cent.; and this decree is without prejudice as to this additional exemption.

As to the claim of exemption set up herein by the Knoxville and Charleston R. R. Co., the court in all things sustains the demurrer, and disallows the exemption claimed, and dismisses the petition and so much of the bill as the claimant relies upon.

65 The Court further adjudges and decrees the 11th section of the act of 20th March, 1875, unconstitutional and void, and the contract between the State of Tennessee and complainant, the Memphis and Charleston Railroad Company based thereon inoperative and of none effect.

It further adjudges and decrees that their (2) two roads, with all their fixtures and appurtenances, including shops, warehouses, and vehicles of transportation, whether purchased with the capital stock or other means of the respective companies, are only exempt from taxation for the terms of 20 and 25 years from their completion, expressly granted to them, notwithstanding the perpetual exemption of such capital stock from taxation by their respective charters, and that the acts of 1875 and 1877, laying a tax thereon, are not violative of their respective contracts, and therefore repugnant to the Constitution of the United States and the State of Tennessee.

The Knoxville and Charleston Railroad Company will, with its surety on the appeal bond, pay all the costs of this cause in this court and the court below, as far as appertains to its own case, and defendants will pay all the balance of the costs, here and below, for which execution may issue.

66 And, thereupon, came the Attorney General, on behalf of the State, and waived the remanding of the cause for answer and further proceedings, and consented to this being entered as the final decree in this cause and court, which is accordingly ordered.

March 13, 1878.

THE MEMPHIS AND CHARLESTON RAILROAD COMPANY
vs
JAMES L. GAINES, Comp., *et als.*
} Davidson Eq. D'k't.

In this cause complainants move for a writ of error to the next term of the Supreme Court of the United States, from the decree herein rendered, and having given bond, with security satisfactory to the Court, and the Court being of opinion that said cause comes properly within the provisions of the judiciary

act, orders said cause to be certified to said Supreme Court of the United States for further hearing and determination.

Supreme Court costs.

67 State tax, ——, Court, $5, ——county tax, —— $5 00

Clerk Cowden, filing record, 75 cts.; entering security, 25 cts.; entering on 8 dockets, 80 cts.; ——continuances, —— cts.; retaxing costs, 25 cts.; motions, 25 cts.; ——orders, 25 cts.; notices, 50 cts.; orders for publications, —— cts.; sci. fa., —— cts.; sug. diminution, —— cts.; certioraria, —— cts.; taking and filing bond, 75 cts.; deed, —— cts.; supersedeas, —— cts.; filing petitions or affidavits, —— cts.; rules, —— cts.; ——writ of possession, —— cts.; procedendo, —— cts.; order to remand cause, —— cts.; copying judgment or decree and opinion, —— words, $4.50; 1 seal 50 cts.; report, —— words, —— cts.; entering decree, $1.00; judgment, 75 cts.; decree on reports, —— cts.; judgment vs. security, 25 cts.; entering Supreme Court costs on docket, 50 cts.; endorsing same on fi. fa., 25 cts.; entering inferior court costs on docket, 50 cts.; endorsing same on fi. fa., 25 cts.; capias, —— cts.; recognizance, —— cts.; fi. fa., 40 cts.; alias fi. fa., and copy costs, —— cts.; enrolling —— words, —— cts.; postage, $1.00; order of appeal, 25; bill costs, 50; transcript to Supreme Court U. S., $18.00 ---------- $32 05

$37 05

In the ——— court of ——— county.

68 Office of the clerk of the supreme court for the middle division of the State of Tennessee.

NASHVILLE, *April* 11, 1878.

I, W. N. Cowden, clerk of said court, do certify that the foregoing is a true, perfect and complete copy of the transcript from the chancery court of Davidson county, and of all the orders, decrees, proceedings and opinions of the supreme court of Tennessee, at Nashville, as the same appears of record now on file in my office, in the case of the Memphis & Charleston Railroad Company against James L. Gaines, comptroller, and others.

In testimony whereof, I have hereunto set my hand and affixed the seal of the court, at office, in the capitol, at Nash-
[SEAL.] ville, on this the 11th day of April, 1878, and the Independence of the United States the 102d year.

WM. N. COWDEN,
Clerk.

69 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Tennessee, greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea, which is in said supreme court before you, or some of you, being the highest court of law and equity of the said State, in which a decision could be had in said suit between the Memphis & Charleston, Mobile & Ohio & Knoxville & Charleston Railroad Companies, and J. L. Gaines, comptroller, and others, wherein was drawn in question the validity of a statute of the said State, under which said railroads claim exemptions, rights and privileges, and the decision was against such rights, privileges and exemptions so claimed under such statute, a manifest error hath happened, to the great damage of said railroads, the plaintiffs, as by their complaint appear—

We being willing that the error, if any there be, should be duly corrected, and full and speedy justice be done to the parties *to the parties* aforesaid, in this behalf, do command you, if judgment therein be given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United
70 States, together with the writ, so that you may have the same at Washington, on the 2d Monday of October next, in said Supreme Court, to be then and there held, that the record of proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 12th day of March, in the year of our Lord one thousand eight hundred and seventy-eight.

[SEAL.] E. R. CAMPBELL,
Clerk of the Circuit Court of the United States for the Middle District of Tennessee, at Nashville, Tennessee.

71 Know all men by these presents: That we, the Memphis & Charleston, Mobile & Ohio, and Knoxville & Charleston Railroad Companies, as principals, and D. H. Poston, as sureties, are held and formly bound unto James L. Gaines and others, in the full and just sum of five hundred dollars, to be paid to the said J. L. Gaines *et als.*, their administrators, executors, successors or assigns. To which payment, well and truly to be made, we bind ourselves, our executors, and administrators, jointly and severally, by these presents:

Sealed with our seals, and dated this the 12th day of March, 1878.

Whereas, lately in a suit depending in the Supreme Court of the State of Tennessee, at Nashville, Tennessee, between the Memphis & Charleston, Mobile & Ohio, and Knoxville & Charleston Railroad Companies, and J. L. Gaines and others, a decree was rendered against said railroad companies, and the said railroad companies having obtained a writ of error, and filed a copy thereof in the clerk office of said court, to reverse the decree in the aforesaid suit, and a citation directed to the said J. L. Gaines *et als.*, citing and admonishing them to be and appear

72 at a Supreme Court of the United States, to be holden at Washington, the 2d Monday of October, next.

Now, the condition of the above obligation is such, that is, the said Memphis & Charleston, Mobile & Ohio, and Knoxville & Charleston Railroad Companies, shall prosecute their said writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void, else to remain in full force and virtue.

MEMPHIS & CHARLESTON R. R. CO.,
Per HUMES & POSTON,
Their Attorneys.

MOBILE & OHIO R. R. CO.,
Per HUMES & POSTON,
Their Attorneys.

KNOXVILLE & CHARLESTON R. R. CO.,
Per HUMES & POSTON,
Their Attorneys.

D. H. POSTON, *Surety.*

Signed and sealed in presence of

Approved by:

JAS. W. DEADERICK,
Chief Justice of the Supreme Court of Tennessee.

73 *Citation.*

THE UNITED STATES OF AMERICA, Greeting:

To J. L. Gaines, comptroller, Thomas R. Shearon, J. W. Ewing and Frank A. Moses.

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the 2d Monday in October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Tennessee, at Nashville, Tennessee, wherein the Memphis &

Charleston, Mobile & Ohio, and Knoxville & Charleston Railroad Companies are complainants in error, and you are defendants in error, to show cause, if any there be, why the said decree rendered against the plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice
74 should not be done the parties in that behalf.

Witness, the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this the 12th day of March, in the year of our Lord one thousand eight hundred and seventy-eight, [1878.]

[SEAL.] E. R. CAMPBELL,
Clerk of the Circuit Court of the United States for the Middle District of Tennessee, at Nashville.

75 Witness, the Honorable James W. Deaderick, chief justice of the supreme court of the State of Tennessee, at Nashville, this the 12th day of March, A. D. 1878.

JAS. W. DEADERICK,
Chief Justice of the Supreme Court of the State of Tennessee.

I accept notice and a copy of the citation and writ of error, and waive all formalities of service and filing of the same.

J. B. HEISKELL,
Attorney General for the State of Tennessee, and Solicitor for Def'ts.

Endorsed on the cover: TENNESSEE, *Sup. Ct.:* No. 673. The Memphis & Charleston Railroad Company, The Mobile & Ohio R. R. Co., and The Knoxville & Charleston R. R. Co., plaintiffs in error, *vs.* James L. Gaines, comptroller, &c. Filed 20th April, 1878.

SUPREME COURT OF THE UNITED STATES.

No.....

THE MEMPHIS & CHARLESTON RAILROAD COMPANY, ET AL.,
APPELLANTS,
vs.
JAMES L. GAINES, ET AL.,
APPELLEES.

IN ERROR FROM THE SUPREME COURT OF THE STATE OF TENNESSEE.

ASSIGNMENT OF ERROR.

The errors assigned are the following:

1st. That said Supreme Court of the State of Tennessee erred in its rulings and decrees, wherein it adjudged that the eleventh section of the Act of 20th March, 1875, the provisions of which had been accepted and by its terms become a part of the charter of the Memphis and Charleston Railroad, was unconstitutional and void as being violative of the rule of equality and uniformity of taxation as prescribed and required by Paragraph 28, Article 2, of the Constitution of 1870. It furthermore erred in holding that the Act of 20th March, 1877, repealing the Act of 20th March, 1875, was constitutional and valid, and not violative of the chartered rights of the several complaining railroad companies.

2d. It erred in its decree when it decreed that these roads, with their fixtures and appurtenances, including shops, warehouses, and vehicles of transportation, were, under the Act of 20th March, 1877, liable to taxation after the expiration of

twenty and twenty-five years from the completion of the respective roads, whether built with capital stock or not, which was and is clearly erroneous, as, by the 11th and 38th sections of the original charters of these roads, the capital stock was forever exempted from taxation, and the Act of 20th March, 1877, taxing same, is violative of such charter exemptions.

3d. Said Court decreed that the Knoxville and Charleston Railroad Company was liable to taxation under the Acts of 1875 and 1877, and was not entitled to any exemptions. In this it erred; for, by the Act of its incorporation, it was expressly provided that it should have all the rights and privileges granted to the Nashville and Chattanooga Railroad Company by its original charter, which Act of incorporation expressly provided for an exemption of capital stock forever, and an exemption for the road and its properties for twenty years from the completion of the road, and said road is not yet completed; wherefore, the Acts of 1875 and 1877, taxing the same, is violative of such charter exemptions, and is void.

4th. Said Court erred in not decreeing that the Mobile and Ohio Railroad Company should never be subjected to any taxation which would decrease its dividends below eight per cent.

W. Y. C. HUMES, AND HUMES & POSTON,
Counsel for Appellants.

Supreme Court of the United States.

No. .....

THE MEMPHIS AND CHARLESTON RAILROAD CO., ET AL.,
APPELLANTS,
vs
JAMES L. GAINES, ET AL.,
APPELLEES.

BRIEF AND ARGUMENT OF HUMES & POSTON,

SOLICITORS FOR APPELLANTS,

The Memphis & Charleston Railroad Co., the Mobile & Ohio Railroad Co, and the Knoxville and Charleston Railroad Co.

FACTS.

On 2d February, 1846, the State of Tennessee chartered the Memphis and Charleston Railroad Company, with all the powers and privileges appertaining to such a corporation, for the express purpose of building and operating a railroad from Memphis, Tennessee, to Charleston, South Carolina. By section 38 of said charter, it was provided: "The capital stock of said "company shall be forever exempt, and the road, with all its "fixtures and appurtenances, including workshops, warehouses, "and vehicles of transportation, shall be exempt from taxation "for the period of twenty years from the completion of the "road, and no longer."

See Schedules Nos. 1 and 2, pages 3 and 6, for charter.

This road was completed on the 28th day of March, 1857.

See Record, page —.

The Mobile and Ohio Railroad Company was duly incorporated by the General Assembly of the State of Tennessee on the 28th day of January, 1848, with all the powers usually given to such a corporation, for the purpose of constructing a railroad from Mobile, Alabama, through the State of Tennessee to some point on the Mississippi or Ohio rivers, near the mouth of the Ohio river.

By the eleventh section of its said charter, it is provided, "That the capital stock of said company shall be forever exempt from taxation, and the road, with all its fixtures and appurtenances, including workshops, warehouses, and vehicles of transportation, shall be exempt from taxation for the period of twenty-five years from the completion of the road, and no tax shall ever be laid on said road, or its fixtures, which will reduce the dividends below eight per cent."

See Charter, Schedules 3 and 4, pages 17 and 23.

The road was finally completed on the 2d day of April, 1861, but the earnings have never been sufficient to pay an eight per cent. dividend.

See Record, page —.

The Knoxville and Charleston Railroad Company was incorporated by an Act of the General Assembly of the State of Tennessee, passed February 18, 1852, to construct a road from Knoxville, Tennessee, to Charleston, South Carolina, and by its charter was invested with all the powers, rights and privileges conferred on the Nashville and Chattanooga Railroad, by its original charter.

See Charter, Schedule No. 5, pages 24 and 25.

The original charter of the last-named railroad was granted by the Legislature of this State on 11th of December, 1845, and by section 38 of its charter, the exact exemptions from tax-

ation granted to the Memphis and Charleston Railroad Company, as above set out, was given to it, to-wit: Total and perpetual exemption from taxation, for its capital stock and the road and its appurtenances, for twenty years from date of its completion—was granted.

See Charter, Schedule No. 6, pages 26 to 39, inclusive.

This road has never been completed.

See Record, page —.

Under these charter conditions, all of said railroads had accepted their charters, with all the benefits and burdens granted to and imposed upon them thereby, and the two first named had completed their roads prior to 1875, and were at that time operating them; and the State had never levied, or attempted to levy, any taxes whatever, but had in good faith exempted said roads from all such public burdens.

On 20th of March, 1875, the General Assembly of this State passed an Act, being Chapter 78 of the Acts of 1875, for the assessment, levy and collection of a tax on *all* the various railroads in the State, excepting none, and without regard or reservation as to those railroads having charter exemptions from taxation. The provisions of said Act are substantially as follows: That a schedule should be furnished the Comptroller, by the several railroads in the State, of all of their property—real, personal and mixed—gross earnings, etc., and penalties were imposed upon failure to make such schedules. Commissioners were appointed to value the properties so reported, and to make return of their assessments to the State Comptroller, who should thereupon refer the same to the Governor, Secretary of State and Treasurer, as a Board of Examiners, to inspect and determine whether or not the assessment and valuation as made was "too low;" and if, in their opinion, such valuations were "too low," then a new Board was to be by the Governor appointed, to reassess and value said roads, *whose action was to be "final."* When such assessments are made and returned to

the Comptroller of the State, it is made his duty to apportion the tax due the State, and each and every county, city and town through which any of said roads pass, and certify the same to them respectively. Provision is then made for the collection of the taxes so imposed. By the 11th section of said Act it is provided, "That each and every railroad company "which will accept as a special amendment to its charter, for a "period of ten years from the 1st day of January, 1875, and "will pay annually to the Treasurer of the State one and one-"half per cent. upon all gross earnings of such road, *shall be* "*in full of all taxation.*"

This section then provides how these gross earnings shall be arrived at, and that all railroads not accepting the provisions of the 11th section shall be taxed as provided for by the previous provisions of the Act. It further provides that any railroad accepting the provisions of this section surrenders all charter or other exemptions after the expiration of said ten years, and all provisos in their charters exempting their property from taxation are declared null and void, "in as full and "ample a manner as if the same was especially set forth in "their respective charters." (For this Act see Schedules Nos. 7 and 8, pages 40 to 51, inclusive.)

The Memphis and Charleston Railroad Company, alone of the three roads represented by us, accepted the provisions of this 11th section, and paid to the Treasurer of the State, on the 10th day of January, 1876, the 1½ per cent. on its gross earnings for 1875, amounting to $5691, and on the 10th day of January, 1877, paid the like per cent. on its gross earnings for 1876, amounting to $5581.

See Record, page —.

Neither the Mobile and Ohio nor the Knoxville and Charleston Railroad Company accepted the provisions of this 11th section of the Act of March, 20, 1875, and they stand in this litigation on their original charter rights and exemptions.

On the 20th of March, 1877, the General Assembly of the State passed another Act, by the 15th section of which it re-

pealed all of the Act of the 20th of March, 1875, in consistent with it, and by the 8th, 9th and 10th sections it abrogated all the rights that had been acquired by the several railroads, who had accepted the provisions of the 11th section of the Act of 20th March, 1875, and provides for the taxation of all railroad companies in the State, without regard to any exemptions contained in their original charters, or the exemptions secured to them by their acceptance of the provisions of the 11th section of the Act of 20th March, 1875.

Section 9 provides that the amounts paid by the various railroads under the 11th section of the Act of March 20th, 1875, shall be credited on the assessments for the years 1875–76–77, and if there be any excess due the railroad companies the same shall be refunded to them by the State, with interest.

Section 3 provides that the Assessors shall, as soon as they have completed their assessment, give four days' notice of the fact, and all parties interested in said assessment shall have ten days' notice within which to file exceptions, with any proof they may desire, which shall be examined, passed upon and corrected by said Assessors, if they deem it proper, and then certify their action to the Comptroller.

By Section 13, the action of the Board of Examiners, provided for by the 6th section of the Act of 20th March, 1875, *shall be final and conclusive as to the value of the roads*, and they may examine the action of the Board of Railroad Assessors, as upon appeal, upon the record as made up by them, and may alter the assessment as they deem proper, if it be too high or too low, in their opinion.

For this Act see Schedule No. 8, page 49.

As before stated, the Memphis and Charleston Railroad Company was the only one of complainants which accepted the provisions of the 11th section of the Act of 20th of March, 1875, and within the ten days allowed by the 3d section of the Act of 20th of March, 1877, it filed its exceptions and protest with said Board of Assessors, together with the proofs to sustain the same, such exceptions and protest setting up and relying upon

its exemption from all taxation forever, as to its capital stock, and for twenty years' exemption as to its other property, from 28th day of March, 1857, as contained in section 38th of its original charter. Said road also relied upon the exemption contained in the provision of the 11th section of the Act of 20th March, 1875, as an amendment to its charter, and as confining by contract the power of the State for ten years, from January 1, 1875, to the 1½ per cent. on its gross earnings, as the only mode and measure of taxation.

The bill avers that it made out its schedule of property as required by the Act of 20th March, 1875, and returned it to the Comptroller, who turned it over to the Railroad Assessors, who have made their valuations, as shown by Exhibit "A" to the Bill. These Railroad Assessors are proceeding alone under the Act of the 20th of March, 1877, and will necessarily overrule and disallow said exceptions and protest *as not within their power or duty to decide*, because said Act imperatively requires them to assess *all roads*, without reference to the exemptions contained in their charters—*the question of value alone being submitted to them.* In like manner, no such question can be determined by the Comptroller, as his duty is alone to apportion the tax, and certify the same to the authorities entitled thereto; and that, under neither Act, can the Board of Assessors, or the Board of Examiners, pass upon or determine the question of exemption set up by said M. and C. R. R. Co. The bill avers that the Memphis and Charleston Railroad Company, having accepted the provisions of the 11th section of Act of 20th of March, 1875, and paid the one and one-half per cent. on its gross earnings as therein provided for, that it is a contract binding between it and the State for ten years, and that the Act of 20th March, 1877, insofar as it attempts or purports to repeal said 11th section, and impose upon complainant's property other taxes than that prescribed in said 11th section, is an impairing of the obligation of complainant's contract with the State, and is therefore illegal and void. That if the 11th section of said Act is unconstitutional, it then stands on its original exemption—and not being liable to any tax until the 28th

day of March, 1877, that the payment of the taxes as made for 1875 and 1876 becomes a debt due to it from the State.

The Mobile and Ohio and Knoxville and Charleston Railroad Companies insist that both, the Acts of 1875 and 1877, and all the proceedings thereunder, are violative of their charter exemptions, and impair the obligation of their contracts with the State, and that if they allow the said Assessors to certify their assessments, and the Comptroller to apportion the tax, that their apportionments under said Acts at once become judgments, and that great litigation will ensue, and they will be compelled to incur great expense and institute innumerable suits against the various counties and towns through which they pass, to protect their rights, which will necessarily hinder and obstruct them in their duties as common carriers. The Memphis and Charleston Railroad Company insists that the 11th section of the Act of 1875 created a contract, binding upon the State; but if in this they are mistaken, then they claim all the charter exemptions under their original charter, in like manner as is claimed by the Mobile and Ohio and the Knoxville and Charleston Railroad Companies, and in the latter view all ask that the Acts of the 20th of March, 1875, and 1877, be declared unconstitutional and void, as impairing the obligation of their contract.

The prayer is for appropriate and general relief, and that injunction issue, and the rights of the railroads be determined and their exemptions enforced.

The defendants, represented by the Attorney-General for the State, interposed several grounds of demurrer, all substantially putting in issue the validity of these several charter exemptions and the Acts of 1875 and 1877.

The cause was finally heard in the Supreme Court of the State of Tennessee at its last December term, 1877, when that Court held that the Act of 1877, in so far as it taxed roads whose charter exemptions had not expired, was unconstitutional and void; but that the capital stock of said roads invested in the road, with its fixtures and appurtenances, including work-

shops, warehouses and vehicles of transportation, was subject to taxation after the lapse of twenty and twenty-five years from completion of the respective railroads, notwithstanding the perpetual exemption of capital stock in their charters, and that in the case of the Knoxville and Charleston Railroad Company, that inasmuch as that company took its rights and privileges by reference to the charter of the Nashville and Chattanooga Railroad Company, that it had no exemption whatever, and the bill as to it was entirely dismissed. The Court further decreed that the 11th section of the Act of 20th March, 1875, was unconstitutional and void, as being violative of the Constitution of the State of Tennessee requiring taxation to be equal and uniform, and that no one class of property should pay any higher tax than other property of same class and value, and the decree was made final, the Attorney-General for the State waiving the remanding of the cause for answer. From this decree the complainants have prosecuted this writ of error.

ARGUMENT.

The Attorney-General on behalf of the State makes no question as to the jurisdiction of this Court to sustain the bill, if, upon the case presented, the complainants are entitled to any relief.

The discussion of the case necessitates a division of the argument into two parts. One, discussion as to the particular case as presented by the Memphis and Charleston Railroad Company, and the other as applicable to the case of the Mobile and Ohio and Knoxville and Charleston Railroad Companies; and, while the main features are the same in both, we beg the indulgence of the Court to point out and elaborate the particular features controlling the decision, as we think, in each particular case.

The questions for discussion seem to us to be narrowed down to the following propositions:

First. Had the General Assembly of the State of Tennessee, under the Constitution of 1834, the power to grant the original charters containing such exemptions as are claimed by the complainants in this cause?

Second. Had the General Assembly of the State of Tennessee, under the Constitution of 1870, the power to enact the 11th section of the Act of 20th March, 1875, amending the charters of such railroads as accepted its provisions and granting the exemptions therein contained?

Third. Are such exemption contracts binding and obligatory upon the State within the meaning of Section 10, Article one (1), of the Constitution of the United States, and Section 20, Article 1, of the Constitution of the State of Tennessee?

Fourth. What is the extent and duration of these exemptions?

Fifth. How far and in what respect do the Acts of 20th March, 1875 and 1877, impair the obligation of these charter contracts, and are they or not, therefore, unconstitutional as against the railroad companies complaining?

Upon the first proposition—Had the Legislature of the State the power, under the Constitution of 1834, to grant such charters as are in controversy herein? We say, undoubtedly, it had. Mr. Cooley, in his work on Constitutional Limitations, defining the power of the Legislature, says:

"The rule of law upon the subject seems to be, that, except "where the Constitution has imposed limits upon the legisla- "tive power, it must be considered as practically absolute, "whether it operate according to natural justice or not, in any "particular case."

* * * * * * * *

"Any legislative Act which does not encroach upon the "powers apportioned to the other departments of government, "being *prima facie* valid, must be enforced, *unless restrictions* "*upon the legislative power* can be pointed out in the Constitu- "tion, and the case shown to have come within them."

Cooley's Constitutional Limitations, p. 168, and Note 4.

The Legislature of this State can do all acts not prohibited by the State or United States Constitutions.

Bell vs. Bank of Nashville, Peck Reports, 269.

Hope vs. Deaderick, 8 Humphreys, page 8.

"The power of the legislative department of the State to "create corporations does not rest alone upon an implication of "sovereignty in legislation, *though that is sufficient to support it.*"

Nicol vs. Mayor and Aldermen, 9 Humph., 263.

Trigally vs Mayor and Aldermen, 6 Caldwell, 388.

The rule then seems to be that the power of the Legislature is omnipotent, save where restrained by constitutional limitation, and that the Constitution of the State is not a grant of power to the Legislature, but a restriction or limitation thereon. It therefore follows that whoever asserts and would maintain the unconstitutionality of an Act of the Legislature must put his finger on the constitutional provision inhibiting such legislative Act.

But let us examine the Constitution of 1834, and see if *express authority* is not thereby delegated to the Legislature to create corporations with such charters as they see proper to grant; the policy, expediency and wisdom of granting the particular charter being *left to their discretion alone.*

The 7th section and 11th article of the Constitution of 1834, which provided that the Legislature should have no power to suspend general laws for particular individuals, nor pass laws for, nor grant immunities and exemptions to, particular individuals, had this proviso: "*Provided, always,* the Legislature "shall have power to grant *such* charters of incorporation as "*they may deem expedient* for the public good."

That there was no necessity for this proviso, unless such authority as we contend for was to be conferred, is manifest from the decisions referred to in Peck and the Humphrey's Reports. As the Legislature had the power to create corporations without any aid from such a source, the power was inherent, unless limited and restrained by the Constitution, and this proviso was inserted to confer express authority upon the Legislature to grant charters of incorporation with exemptions, as they saw proper, and not leave such authority doubtful and uncertain; they were to grant such charters and incorporations *as they deemed expedient*—they were to be the sole judges, and they alone.

"The Court can know nothing of public policy except from "the Constitution and the laws, and the course of administra- "tion and decision. It has no legislative power. It cannot "examine, question as expedient or inexpedient, as politic or "impolitic. Considerations of the sort must in general be ad- "dressed to the Legislature. Questions of policy there are "concluded here."

License Tax Cases, 5 Wallace, 469.
Cooley's Constitutional Limitations, top page 169.

Upon this power of the Legislature to grant such exemptions as were contained in the original charters of these several complaining railroads, the decisions of the Supreme Court of the United States are numerous and uniform, beginning with the Dartmouth College case, and coming down to the present time.

Pacific R. R. vs. McGuire, 20 Wal.
Wilmington R. R. vs. Reed, Shff., 13 Wal.
Humphrey vs. Pegues, 16 Wallace.
1 Black, 436.

But without pursuing this branch of our subject farther, we insist that the question has been definitely settled by the decision in the case of DeSoto Bank and others vs. State of Tennessee, rendered on Monday, 14th January, 1878, by Supreme Court of the United States, reversing decision of the Supreme

Court of the State of Tennessee, rendered in 1874 or 1875, and in case of Knoxville and Ohio R. R. Co. vs. Hicks, Supreme Court of Tennessee, MS. opinion, at Knoxville, September term, 1877, where all the questions at issue here were decided in favor of such exemptions. In fact, the very case at bar raised the same question, and is decided in harmony with the general and uniform current of decision, especially of the United States Courts.

The second proposition is as to the constitutionality of the 11th section of the Act of 20th March, 1875, as appertains to the Memphis and Charleston Railroad Company, it being shown by the record that it has fully complied with the terms and conditions thereof. We have, we think, clearly shown that under the Constitution of 1834, such a contract would have been valid, as there was no constitutional prohibition against the same. It follows, then, that the Legislature possessed the same power to legislate in 1875, unless the Constitution of 1870 put some limitation on such powor; and its constitutionality depends upon some limitation upon the legislative authority contained in that Constitution which was not incorporated into the Constitution of 1834.

Let us examine, then, and see what the provisions of that Constitution are, which can in any respect be claimed to defeat the exercise of such power.

By the 2d section of the 11th article thereof it is provided:

"Nothing contained in this Constitution shall impair the "validity of any debt or contract, or effect any rights of prop- "erty, or any suits, actions, rights of action or other proceed- "ings in Courts of justice."

This would have been so without such provision, and we only call attention to it to show its presence and controlling influence on the minds of the framers of the Constitution.

No provision can be found in that instrument which limits the power of the Legislature over property exempt by contract from taxation, except that it cannot impair the obligation of such contract. The General Assembly is left free to deal with such exempted property, according to its wisdom and discretion, when it seeks to derive a revenue from it. The rules of uniformity only apply to property subject to taxation. If this be correct, the Legislature had the right to purchase the surrender of those exemptions, and derive a revenue from the exempted property, on such terms as that body deemed most expedient for the good of the State.

And the Legislature, being omnipotent save so far as limited or restricted by the Constitution, is left untrammeled, to deal with this exempted capital and property according to its discretion.

Whether the Court construe the 38th section of the complainant's charter as we insist, or as the Attorney-General insists, still the Legislature could constitutionally enact the 11th section of the Act of 1875. The exemption was in force at the date of the adoption of the Constitution of 1870, and at the date of the passage of the Act of 1875. The capital stock was perpetually exempt, and the other property had seven and a quarter years exemption at the date of the adoption of the Constitution of 1870, and two and a quarter years at the date of the Act of 1875. Neither the capital stock nor the other property was subject to the constitutional rules of uniformity of taxation, because not taxable.

The Legislature is not a special agent, but a sovereign legislative department of government with all power not forbidden. It is charged with the duty of raising whatever revenue the exigencies of the State require. The Courts, for these reasons, are always most liberal in construing the power as ample and broad enough to discharge this great and undefinable duty. Therefore we submit the Court may properly declare the legislative power to purchase the then existing exemptions, and derive an immediate revenue from the exempted property, as unrestricted by the rules of uniformity of taxation. In the

Illinois Central Railroad Company vs. McLean County, 11 Ill. R., at p. 295, the Court says: "There is no subject upon "which the Courts have sustained legislative power with "greater liberality of construction than on this of the revenue. "And it is needful that the Legislatures should have the power "commensurate with the revenues required to furnish vitality "to the body politic." And at page 296 they say: "We have "presented these decisions to show the constant support given "to this vital power of government, not only to levy taxes, but "every disposition the Legislature may, in their wisdom, make, "with a view to the public good, unless in palpable violation "of the constitutional rights of the taxpayers."

The Supreme Court of the State of Tennessee in Knoxville and Ohio R. R. vs. Hicks, M.S.S. (Judge McFarland delivering the opinion, in September, 1877.)

"The Constitution of 1834 declared that a well regulated "system of internal improvement should be encouraged, and "for such purposes the Legislature has often appropriated the "revenues of the State, and further, loaned the credit of the "State to the extent of immense sums. The power to do this "has never been questioned. If the Legislature can thus ap-"propriate and use the public money, it is difficult to see why "it may not stipulate for the release of part of the public "taxes for the same purpose, as it would be in effect the same. "Upon this declaration of the Constitution the Legislature has "from time to time freely acted."

The complainant company held a contract under its charter, exempting its capital stock perpetually from taxation, and exempting its road and appurtenances until the 28th of March, 1877, from all taxation. The General Assembly of 1875, by the 11th section of the Act, ch. 31, of that year, purchased a surrender of those exemptions, and secured immediately an annual revenue of 1½ per cent. on the gross earnings of the company, which had never paid any tax, and whose liability, therefore, in the future, was doubtful, and agreeing therefore that this should be the measure of its taxation for ten years.

This proposition, asserting the power of the Legislature to

make such contract, cannot be denied so far as it is limited to the twenty years of exemption. We insist it is equally undeniable, for the entire period of ten years from January, 1875, *because the Constitution nowhere prohibits the Legislature from dealing with this exemption,* hence its power is unlimited.

The capital stock being perpetually exempt, its surrender could be purchased by the ten years' commutation.

The Constitution of Illinois contains provisions requiring taxation to be imposed by the same rules of uniformity as our own. Yet in the case of the Illinois Central R. R. Co. vs. McLean County, 17 Ill. R., p. 291, the Supreme Court of that State held that it was not a violation of this rule of uniformity to contract with a railroad company in its charter for a fixed per cent. on its gross earnings in commutation for all taxes for a definite period.

Burrough on Taxation, 66.
Cooley on Taxation, 137.
Ill. Cen. R. R. Co. vs. McLean Co., 17 Ill. R., 291.
Hunsacker vs. Wright, 30 Ill. R., 148.
State Bank vs. People, 4 Scam., 303.
Louisiana State Lottery Co. vs. City of New Orleans, 24 La. Am. R., p. 86.

That a State may commute taxes on corporate property, and yet not violate the rule of equality and uniformity, is well established.

Mr. Burroughs, in his work on taxation, at page 66, says:

"The power of the Legislature to commute taxes is not restrained by the provisions of equality and uniformity. It is a practice very general in most of the States to require corporations, such as banks, railroads, etc., to pay annually into the treasury a certain amount, and to exempt them from the payment of all other State taxes, and, sometimes, from the payment of all other taxes. It is considered that the State has obtained an equivalent for the amount which would have obtained in the usual mode."

In Cooley on Taxation, speaking of same matter, he says, on page 137: "Neither do they take away from the Legislature "the power to commute for taxes, receiving instead what they "shall regard an equivalent."

In Hunsacker vs. Wright, 30 Ill., 146, a bill was filed to enjoin the collection of a county tax on property situate in the city of Cairo, on the ground that, by the charter of the city, its property was exempt from county taxation upon condition that the city should support the resident paupers thereof, and pay the expenses of the Criminal Court for all offenses committed by its citizens, together with all jail fees accruing therefrom.

The bill alleges that, notwithstanding the city has complied with its charter conditions and contracts, that the county has levied its taxes upon its property the same as other property in the county. A demurrer was interposed, raising the grounds that the charter so granted was in violation of the constitutional provisions in regard to equality and uniformity of taxation.

This demurrer was overruled and the injunction made perpetual, from which an appeal was prosecuted.

Walker, J., on page 147, says:

"The grounds urged for reversal of the decree are, that these "provisions of the charter are in conflict with the 2d and "9th Articles of the State Constitution.

"That, under these sections, the General Assembly are "powerless to make such exemptions from taxation. The first "of these sections declares that 'The General Assembly shall "provide for levying a tax by valuation, so that every person "and corporation shall pay a tax in proportion to the value of "his or her property.'"

The latter provides that "The corporate authorities of coun-"ties, townships, school districts, cities, towns and villages, "may be vested with power to assess and collect taxes for cor-"porate purposes, such taxes to be uniform in respect to per-"sons and property within the jurisdiction of the body impos-"ing the same."

"These provisions were manifestly inserted in the funda-

" mental law for the purpose of insuring equality in the levy " and collection of taxes to support the government, whether " levied for State, county or municipal purposes.

" The design was to impose an equal proportion of these " burdens upon all persons within the limits of the district or " body imposing them. Under these provisions the Legisla- " ture has no power to exempt or release a person or community " of persons from their proportionate share of these burdens.

* * * * * * * *

" But it is urged that this provision does not prevent the " Legislature from commuting such a tax for an equivalent " burthen. That in commuting such a tax with a county, city " or other corporate body, or with an individual, the General " Assembly are to be the *sole judges* of the sufficiency of the " equivalent to be received in lieu of the tax.

" It is obvious that if they commute at all they must be the " *sole judges of its propriety, and their acts are not subject to* " *the revision of any other power in the State.*

" If this power is possessed, it is liable to many and great " abuses.

" This question is, however, not one of first impression in " our jurisprudence. In the case of *State Bank vs. the People,* " 4 Scam., 303, which arose ander the old Constitution, the " question of the power to commute a tax was presented and " determined by the Court. It was there held that the Legis- " lature might exercise such a power, it not being prohibited " by the Constitution.

" It is true that case arose under a different instrument, but " its provisions were essentially the same as those in the present ' Constitution, so far as they relate to equality in taxation.

" This question was again presented under the present Con- " stitution in the case of *The Illinois Central Railroad vs. the* " *County of McLean,* 17 Ill., 291. It was there held that the " General Assembly had the power to commute the *ad valorem* " tax on the property of the company for a certain per centage " on the gross receipts of the road.

" These cases fully recognize this principle. It is true they

" were both private, and not municipal corporations. But the " principle is the same. In fact, the exercise of the power in " favor of a municipal corporation is less objectionable than " with a private body, as in the former the provision is subject " to repeal at any time, whilst with the latter it assumes the " character of a contract.

" The exercise of this power depends upon a different prin- " ciple from the right simply to exempt bodies of persons or " classes of property from this burthen, and the decree was " affirmed."

In Louisiana State Lottery Co. vs. City of New Orleans, 24 La. Annual R., 86, plaintiff obtained an injunction against the defendant and its Police Board to prevent them from interfering with the plaintiff in the enjoyment of its franchises as a lottery company, under an Act of the Legislature of the State of Louisiana, whereby it was provided that in consideration of $40,000 paid to the State per annum, for the purposes of education, the State exempted the plaintiff from all other taxation. The city deeming this Act void, as violative of the rules of equality and uniformity, attempted to force the plaintiff to take out city license. The injunction was granted.

The Board of Metropolitan Police answered by general denial.

The answer of the city denies the exemption by law of the Lottery Company from the payment of any taxes and licenses to the city, and makes the points—

First—"*That the Act of the Legislature under which the com-* " *pany sets up the immunity it claims, is unconstitutional and null,* " *for the reason that the purpose and object of the Act is not ex-* " *pressed by its title, as required by the Constitution of the State,* " *Article* 114."

Second—"*That the Act is violative of Article* 118 *of the State* " *Constitution, because it infringes the principle of equality and* " *uniformity in the matter of imposing taxes, the plaintiff paying*

" a fixed sum annually to the school fund, paying nothing to the " other purposes of government; that the Legislature, under the " Constitution, is inhibited from exempting from taxation any " species of property, except such as is actually used for charitable, " educational, or religious purposes."

Third—" That the Act is in violation of Article 2 of the " State Constitution, for the reason that it grants certain rights " to the plaintiff which are denied to other citizens of the " State."

Talliafero, J., on page 88, says:

* * * * * * * *

" To the second ground of defense, that the Act is in deroga- " tion of the equality and uniformity required in levying " taxes, it may be said that the power of a State Legislature to " impose what is known as a *commutation tax* is a well recog- " nized power, not only in our own jurisprudence, but generally.

" 11 An., 733.
" 9 Wallace, 50.
" 17 Illinois, 291.
" 30 Indiana, 146.

" In the Act under consideration the Legislature has deemed " it advisable to grant to the Lottery Company an exemption " from all other taxation except that of paying $40,000 per " annum to the State for public education.

" On the commutation principle, we think the Act is not " violative of the Constitution. It is not clear that the city " has any ground to object to this exemption by the State of " the company it claims the right to require the payment of " licenses from, the city being a municipal corporation and de- " riving its right to levy licenses from the State, and in this " instance the right is withheld."

Judgment affirmed and injunction made perpetual.

To same effect are the cases of People vs. Barger, 62 Ill., 452; Supervisors vs. Campbell, 42 Ill., 490; Chicago vs. Sheldon, 9 Wallace, 50.

We say, if the Legislature could, in 1875, have purchased the exemptions with so much money out of the Treasury of the State, why could it not purchase the same exemptions by making a contract with all this class of railroads not for an exemption, but for the payment of taxes yearly, according to a uniform rule applicable to all this class of property and regulated according to the gross yearly earnings, one of the appropriate modes of fixing value?

The Attorney General's objection to this view is that the contract is illegal, because as to the property of the railroad company this new contract would extend beyond the existence of the old exemption, when it would become taxable and subject to the rules of uniformity. We reply: "The rule of "uniformity is preserved in the new contract as to all this class "of property, and is according to value, the yearly gross earn- "ings being one appropriate mode of ascertaining the value of "this class of property."

Our own Supreme Court, in L. & N. R. R. Co. vs. State of Tennessee, 8 Heiskell, 798, says (in speaking of railroad taxation and assessments):

"A tax on a corporation may be proportioned to the income "revenue, as well as to the value of the franchise granted or "the property assessed."

In Paine vs. Wright, 6 McLean, p. 400, the Court says:

"In all enterprises intimately connected with the public "interest, such as railroads, banks, etc., which require a large "investment of capital, there is no mode of taxation so equal "or just as a tax upon the profits."

To same effect is Delaware R. R. tax, 18 Wallace, 206.

But, again we say, the rule of uniformity is not violated by this 11th Section of the Act of 1875. The 28th Section of the 2d Article of the Constitution of 1870 provides: "All "property shall be taxed according to its value, that value to "be ascertained in such manner as the Legislature shall direct, "so that taxes shall be equal and uniform throughout the "State; no one species of property from which a tax may be "collected shall be taxed higher than any other species of prop- "erty of the same value."

The manner of ascertaining the value is left absolutely to the discretion of the Legislature.

Our own Supreme Court, in Jenkins vs. Ewing, 8 Heiskell, 478, opinion by Ch. J. Nicolson, in construing Section 28 of Article 2 of Constitution of 1870, above quoted, says: "This "is an absolute and imperative inhibition upon the Legislature "requiring them, in taxing property, to provide that it be "taxed according to value, *but expressly excepting from the inhi-* "*bition the manner of ascertaining that value. This much* is left "to the *discretion* of the Legislature, but the *discretion* is to be "so exercised that no one species of property, from which a tax "is collected, shall be taxed higher than any other species of "property of the same value."

How, then, can it be said that taxing of the property of a certain class of railroads by their gross annual earnings is unconstitutional? The manner of ascertaining the value is controlled by no rule of the Constitution. In fact, the General Assessment Act of 1873 prescribes one rule for ascertaining the value of realty, and another and different rule as to personalty, and another and different rule for the capital of merchants, and different rules for persons complying with the statute requiring the filing of schedules, and those omitting to do so. And the Acts of 1875 and 1877 prescribe still different and peculiar rules of valuing railroad property.

Why may not the Legislature prescribe different rules for

ascertaining the value of the property of different classes of railroads, and tax them according to that value?

All that the Constitution requires is, that no part of a class shall pay a higher rate, or be otherwise taxed, than others of the same class. There are two classes of railroads—one with exemptions and one without—and a mode for the taxation of each class. We can see no objection.

If, however, the Court should hold with us, as is hereinafter argued, that the clause exempting the capital stock perpetually exempts the tangible property of the railroad company to the extent of the amount of the capital stock, then all constitutional objection is removed to the validity of the 11th section of the Act of 1875. For, as the exemption of the property in which the capital stock was invested was perpetual, so the contract in lieu might be perpetual, or for ten years.

But we insist that it is clear that property wholly exempt from taxation is not subject to the rule of uniformity, but is left to the discretion of the Legislature and its contracts with the parties.

Sedgwick on Con. and Statutory Law, p. 228, 41 New Hampshire, p. —.

Knoxville and Ohio R. R. Co. vs. Hicks, Tenn. Supreme Court, Knoxville, Sept. Term, 1877, MS.

But laying aside these matters, and admitting, for the sake of argument, that the said 11th section of the Act of 20th March, 1875, was unconstitutional, then the controversy is resolved into a question as to the rights of the said roads, under their respective charters, and if their exemptions are held valid and binding, then it results in the Acts of 1875 and 1877 being determined invalid, as unconstitutional.

The third proposition presented: "Is such an exemption a contract binding and obligatory upon the State within the meaning of Section 10, Article 1, of the Constitution of the

United States, and Section 20, Article 1, of the Constitution of this State?"

We say it undoubtedly is. This principle was decided in our State as far back as Peck's reports, and in Union Bank vs. The State, 9 Yerger, page 494; the following forcible enunciation thereof was made by Judge Turley:

"Ever since the determination of the great case of the Trustees of Dartmouth College vs. Woodward, 4 Wheaton, 518, it has been considered as settled beyond controversy, that a charter of incorporation is a contract, and that any statute altering it in a material respect, without the consent of the corporation, is a law impairing the obligation of the charter, and is unconstitutional and void."

* * * * * * * *

And in same case, on page 495, he says: "We repudiate the "idea that a convention of a State has more power to violate "contracts than the Legislature."

To the same effect, see

Hazen vs. Union Bank, 1 Sneed, 116–119.

Knoxville and Ohio R. R. vs. Hicks, Knoxville, September, 1877.

In this last case, decided in September, 1877, McFarland, Judge, says:

"It has been settled, since the Dartmouth College case, that the charter of a private corporation, when accepted, becomes a contract which cannot afterwards be impaired by legislative action, when the power to do so is not reserved. Stipulations for exemption from taxation, or the payment of a bonus in lieu of taxation, are important elements of the contract, and are protected by Section 10 of Article 1 of the Constitution of the United States, and a similar provision in the Constitution of the State. That the Legislature of a State has the power to bind the State by such contracts, where that power is not denied by the Constitution, is also a result of these authorities.

"As often as this question came up before the Supreme Court of the United States it was earnestly resisted, upon the ground

that to permit one Legislature to barter away the State's inherent right of taxation, so as to bind successive Legislatures, is subversive of the government itself, and allows the burthens of taxation, which should fall upon all alike, to be shifted from the property of the wealthy corporations to the shoulders of the remaining taxpayers. If this was a new question it would deserve the most serious consideration, and Courts would now doubtless hesitate long before establishing it; still it is too well established to be at once overthrown, and so the counsel for the State concede. See Gordon vs. Appeal Tax Court, 3 Howard; 4 Wheaton, 518; 4 Peters, 514; 1 Black, 436; 3 Wallace, 264; 7 Cranch, 164."

See, also—

Angell & Ames on Corporations, sections 470–71–72–73–74–75–76.

Cooley's Constitutional Limitations, 280–1.

Sedgwick on Constitutional Law, 558.

19 Ark, 372; 4 Wallace, 143; 13 Wallace, 264–269; 16 Wallace, 244; 18 Wallace, 206–391; 20 Wallace, 39.

In fact, the entire current of decision, State and Federal, is all in that direction.

In order to make such a charter contract binding it is not necessary that any actual pecuniary consideration be paid therefor.

Angell & Ames on Corporations, 476.

Dartmouth College vs. Woodward, 4 Wheaton, 519.

Regents University of Maryland vs. Williams, 9 Gill & Johnston, 365.

Hazen vs. Union Bank, 1 Sneed, 119.

In the case in 4 Wheaton U. S. Reports, Chief Justice Marshall said: "The objects for which a corporation (meaning a "private corporation) is created, are universally such as the "Government wishes to promote. They are deemed beneficial "to the country, and this benefit constitutes the consideration,

"and in most cases the sole consideration of the grant."

To the same effect is the case in 9th Gill & Johnston, 365.

In Hazen vs. Union Bank, 1 Sneed, 119, the Supreme Court says:

"The act of incorporation is therefore a contract founded "upon a consideration between the State and the corporators; "*not, indeed, that any consideration was necessary to give it that* "*character.*"

We further insist that—

By Article 1, Section 10, of the Constitution of the United States, this is a Federal question.

And whether arising in the Federal Court or in the State Court, it is to be ultimately decided by the Supreme Court of the United States. If it arise in the State Court, it goes to the Supreme Court of the United States, under and by virtue of 25th Section of the Judiciary Act of 1789, and that, therefore, the decisions of the Federal Courts are binding on the State Courts.

In the decision of this question the Supreme Court of the United States is not bound by the decisions of the State Courts.

Dodge vs. Woolsey, in 18 How., goes fully into the question, and it is there shown to be the duty of that Court to determine the question itself, as, indeed, it has always done from New Jersey vs. Wilson, in 7 Cranch, down to the present term of the Supreme Court; in the case of Humphreys vs. Peagues, from the Supreme Court of South Carolina, 16 Wall., p. 244, in which Mr. Justice Hunt, delivering the opinion of the Supreme Court, says: "Another question is raised, to-wit: That a Legislature does not possess the power to grant to a corporation a perpetual immunity from taxation. It is said that the power of taxation is among the highest powers of a sovereign State; that its exercise is a political necessity, without which the State must cease to exist, and that it is not competent for one Legislature, by binding its successors, to compass the death

of the State. *It is too late to raise this question in this Court.* It has been held that the Legislature has the power to bind the State in relinquishing its power to tax a corporation. 1 Black, 436. It has been held that such a provision in the charter of an incorporation constitutes a contract that may not be subsequently impaired. 4 Peters, 514; 4 Wheat, 518; 3 Wal., 51. These doctrines have been reiterated and reaffirmed so recently as the year 1871, in an opinion delivered by Mr. Justice Davis, in the case of the Wilmington Railroad vs. Reid, 13 Wal., 264: 'THEY MUST BE CONSIDERED AS SETTLED IN THIS COURT.'"

We next in order consider the fourth proposition, as to the extent and duration of these exemptions.

The exemption clause of the Memphis and Charleston and Knoville and Charleston railroad charters are identical, and are as follows:

"The capital stock of said company shall be forever exempt "from taxation, and the road, with all its fixtures and appur- "tenances, including workshops, warehouses and vehicles of "transportation, shall be exempt from taxation for the period "of twenty years from the completion of the road, and no "longer."

See Schedules 1 and 6, Section 38, pages 14 and 38.

The Mobile and Ohio railroad's exemption is as follows:

"The capital stock of said company shall be forever exempt "from taxation, and the road, with its fixtures and appur- "tenances, including workshops, warehouses and vehicles of "transportation, shall be exempt from taxation for the period "of *twenty-five years* from the completion of the road, and no "tax shall ever be laid on said road or its fixtures, which will "reduce the dividends below eight per cent."

See Schedule 3, Section 11, page 22.

Now, as to the extent of the exemption: The first provision is that the capital stock shall be forever exempt from taxation. Next, the road, with all its fixtures, including workshops, warehouses and vehicles of transportation, shall be exempt from taxation for the periods of twenty and twenty-five years from the completion of the roads, and, lastly, *no tax shall ever be laid on said Mobile and Ohio railroad, or its fixtures, which will reduce the dividends below eight per cent.*

We take up these various propositions *seriatim*, and discuss them separately:

In the first place, if there was no other provision of the charter than "that the capital stock shall be forever exempt "from taxation," then we might, upon high authority, insist that the entire property of the corporation represented in capital stock was free from any tax, as many decisions have been rendered, by both State and Federal Courts, sustaining this position. The true construction of the 38th section of the plaintiff's charter makes *the capital stock identical with, and represented by, the property purchased with the capital stock*, and exempts it, as the capital stock; and, further, it makes the exemption of the property (secured by the next clause for twenty years from completion, and no longer,) apply to that property in excess of the capital stock, and to sustain this view we cite the following authority, as showing that the "capital stock" of a corporation represents the tangible property in which it is invested, and if this is exempted from taxation by a valid contract, that it is illegal and double taxation to tax such property:

Mr. Cooley, in his Treatise on Taxation, says, at page 393:

"But to tax the capital stock and also the property in which "the capital is invested, would be imposing the same burden "twice on the same property, and consequently unjust, if not "illegal."

Burrough on Taxation, at page 178, says:

"A tax on the property of a corporation and also a tax on

"the capital stock is double taxation. The property of the "corporation is the tangible form in which the capital is in- "vested in order to conduct the operations of the company, "and if the *capital stock* of a corporation *is exempt, the exemp- "tion will extend to all the property owned by such corporation.* "It will not be presumed that the Legislature intended to tax "twice." And on page 142 same author says: "An exemp- "tion of the stock of a corporation extends to all the property "of the corporation. Capital stock exists only nominally. "The money or property it represents is the tangible reality."

A tax upon the capital stock of a corporation is a tax upon all its property, real and personal, because the capital stock is the representation of all the property held under it.

Gordon vs. Baltimore, 5 Gill, 236.

Baltimore vs. Balt. & Ohio R. R. Co., 6 Gill, 294.

In State vs. Cumb. & Penn. R. R., 40 Md., 51, the same principle is announced. "Now, the capital stock of the several "mining companies of the State is liable to taxation according "to a fixed and certain rate; and the *stock being the representa- "tive of the whole property* of the corporation, the payment of "the tax on the capital stock exempts from taxation all the "property, both real and personal, of the company. And al- "though the State may elect to tax either the capital stock or "the real and personal property of the company, *yet it cannot "tax both.*"

In Bedford vs. Mayor of Nashville, 7 Heiskell, 413, Judge McFarland expressed the same view as quoted from Judge Cooley. In speaking of the case in hand, he says:

"Now, by this law, the capital of the corporation is exempted, "and in its place the tax is divided amongst the stockholders. "It would seem to be the same thing in a different shape."

In the Iron City Bank vs. Pittsburg, 37 Penn. State R., 340, the city of Pittsburg levied a tax of a third of one mill

on the discount business of all banks doing business in the city.

The plaintiff resisted it on the ground that it impaired its charter contract with the State, which provided that its capital stock should not be subject to any other but State taxation.

To which defense is made that it is not the capital stock, but the discount business of the bank, which is sought to be taxed.

Woodard, J., delivering the opinion, on page 342 said: "We "are not satisfied with this reply. It is true that most banks "of discount do business greatly beyond their capital. They "discount on their deposits and on their credit, but they do also "discount on their capital. It is this, indeed, which attracts "the confidence of depositors, and gives credit to the paper "which they issue, so that the capital stock is the real founda- "tion of all the business of the banks, and enters specifically "into their discounts. If, therefore, the average quarterly dis- "count business of the bank is to be taxed without taxing the "capital, all that part of its business into which the capital "enters must be laid out of account, and the residue of its busi- "ness only taxed. But how is the discrimination to be made? "The City Assessor does not seem to have attempted to make "it, and he would probably have failed had he attempted it. "It may be true that part of the tax assessed is not a part of "the capital, but it is unquestionable that part of it is a tax of "the capital. To tax the business which capital does, is to tax "the capital. This is as certainly true as that taxation of cap- "ital is a burthen on the business in which it is engaged. The "least, then, that can be said of the city's assessment is, that it "is a tax on the capital of the bank to some extent—and if to "any extent, the bank has a right to complain of the infringe- "ment of its contract with the State. It has a right to say— "the State stipulated that our capital stock should not be taxed "for city purposes; your tax is, in part, at least, upon our cap- "ital stock, and until you distinguish that part, and withdraw "it, we know not how much of your tax to pay, and therefore "will pay nothing."

In Trask vs. McGuire, 18 Wallace, page 402, Judge Field, in treating upon this subject, says:

"On the argument some attempt was made—from the use of "the term *stock* in the original Act, and the language of the "amendatory Act, that the property should be vested in the "respective shareholders according to their respective shares— "to establish the position that the exemption extended only to "the separate shares of the individual stockholders.

"But the argument does not strike us as possessing much "force.

"The terms 'stock of the company,' imported the capital "stock of such company, the subscribed fund, which the com- "pany held, as distinguished from the separate interests of the "individual stockholders."

In Wilmington Railroad vs Reid, 13 Wallace, 264, the exemption in the charter of the railroad company was, "*and the* "*property of said company, and the shares therein, shall be ex-* "*empt from any public charge or tax* whatsoever," and an effort was made by the State of North Carolina to tax the franchise and rolling stock. An injunction was sued out to enjoin the tax, and the Supreme Court of the State held the tax proper, and upon a review by the United States Supreme Court it was held that the franchises and rolling stock and lots of land appurtenant to and forming a part of the property used by the company in the transaction of its business, was exempted from the tax, and they reversed the decision of the North Carolina Supreme Court.

In town of Connersville vs. Bank of Indiana, 16 Indiana, 105, the bank sued the town on orders, and the town set up as an offset taxes alleged to be due from it to the town. Set-off disallowed and judgment for the bank, from which an appeal was taken. The taxes alleged to be due the town were assessed upon the money and notes of the bank on hand. The Court held: "By the charter the capital stock of the bank is not "taxable for municipal purposes. The capital stock consists

"originally of the money paid in by the subscribers to the "stock of the bank. This changes its form, and is represented "by notes of other persons or corporations, *but is still capital "stock so far as to be exempted from taxation.* The charter may "be wrong, but this is its spirit. For deposits the bank is "debtor; for notes in hand, beyond its capital stock, she is "debtor by the issue of her own. Profits she divides to the "stockholders in the shape of dividends," and the judgment was affirmed.

Sebring vs. City of Charleston, 5th Richardson, 561, the City of Charleston by ordinance imposed a tax of *five per cent.* on every *one hundred* dollars of *dividends* received on bank or other stocks, and plaintiff enjoined the tax on the ground that he was the owner of *stock* in the State Bank, by the 10th Section of whose charter it was declared, that "*the said corporation and the stock thereof* shall be relieved from the payment of *all taxes* during the time it is hereby incorporated;" and that by reason thereof, the income therefrom was not subject to taxation; and the Court held the tax improper, and enjoined the same.

In State vs. Hood, 15 Richardson, 178, *the stock and real estate* of each of these companies employed in, or subservient to its chartered enterprise, were exempt from taxation by charter; and an Act of the Legislature was subsequently passed, levying a tax of one dollar on every one hundred dollars of the *gross income of all railroads not exempted by law;* and the railroads with such chartered exemptions contested their liability to pay the tax on the gross income. Inglis, J., at page 188, says: "Taxing the income of the stock is only another mode "of taxing the stock itself. And hence, an exemption of the "stock in terms from taxation, would be nugatory, if the income "was not thereby equally exempt. If the income can be taxed "the stock is not exempt," and he refused the tax.

In Gordon vs. Appeal Tax Court, 3 Howard, 339, the language of the exemption was, that the faith of the State was

pledged " not to impose any further tax or burden upon them " during the continuance of their charters under this Act," and the United States Supreme Court held that a tax upon a stockholder by reason of their stock was a violation of this contract, and the tax was illegal.

In 54 New Hampshire R., 406, by Section 33 of the charter of the Michigan Central Railroad Company, it was provided that the corporation, after February 1, 1857, shall pay to the State an annual tax of three-quarters of one per cent. upon its capital stock paid in, including the two million dollars of purchase money paid to the State, and also upon all loans made to said company for the purposes of constructing its road, or purchasing, constructing, chartering or hiring steamboats ; and the property and effects of said company, whether personal or mixed, shall, in consideration thereof, be exempt from all and any tax, charge or exaction, by virtue of any law of this State now or hereafter to be in force, except penalties by this Act imposed.

Held, to exempt the shares of stock from taxation in the hands of stockholders.

In the case of the Ordinary of Bibb County vs. Central R. R. et al., 40 Ga., 646 :

The County of Bibb attempted to levy a county tax on defendants, whose charter permitted them " to purchase and hold all real estate that may be necessary and proper for the purposes of laying, building and sustaining said road, with the proviso as to taxation set out in the opinion of the Court."

Warner, J., in delivering the opinion, said :

" The charters of the respective railroad companies authorize them to purchase and hold all real estate that may be necessary and proper for the purpose of laying, building and *sustaining* said railroads, and that the said railroads, and the appurtenances of the same, shall not be subject to be taxed higher than one-half of one per cent. upon their annual net income, and no municipal or other coporation shall have power to tax the *stock*

of said companies, but may tax any property, real or personal, of said companies within the jurisdiction of said corporation, in the ratio of taxation of like property.

"What is the 'stock' of said railroad companies?

"Bouvier defines stock to be 'the capital of corporations; "'this is usually divided into shares of a definite value—as one "'hundred dollars, fifty dollars per share.'

"Second Bouvier's Law Dictionary, 531.

"The stock of these companies then consists of their capital invested in such property as may be necessary and proper for conducting the business for which the were chartered.

"*All the property* of these companies that is *necessary* and *proper* for the purpose of laying, building and *sustaining* their respective railroads, constitutes a *part of the capital stock* of said companies, and is not liable to be taxed in any other manner than is specified in their respective charters.

"Any OTHER property owned by said companies, which is *not necessary* and *proper* for the laying, building and *sustaining* said railroads, and not necessarily appertaining thereto for *that purpose*, may be taxed by the county or other corporation in the same ratio of taxation of like property. The companies cannot be taxed twice on their capital stock, employed in conducting the legitimate and necessary business thereof under their respective charters, once by the State and then by the counties, or other corporations, for it is expressly stipulated in their contract with the State that they shall not be taxed higher than one-half of one per cent. on their annual net income, and that no municipal or other corporation shall have power to tax *the stock* of said companies. If they pay to the State the stipulated tax on their net annual income arising from *the use of their capital stock*, and then be required to pay a county or corporation tax upon *the property* necessarily used and employed as a part of their capital *stock*, which produces their net annual income, then, *practically*, they are taxed *twice*, which, in my judgment, would be a violation of their respective charters."

And the Court held in this case that in no event could any of the property used and employed in the business of the com-

panies be subjected to any tax, except as provided for in their respective charters; but that all property taken for debt or bought for the use of the companies, but not in actual use, was subject to taxation.

In Douglas, Receiver, vs. State, Orange, etc., E. R. R. Co., 34 N. J., 487, defendant's charter read as follows: "That as "soon as the said company shall declare to their stockholders "dividends equal to seven per cent. per annum, from and after "the commencement of the building of said road, and so long "as said company pays dividends of seven per cent. per annum, "the said company shall pay to the Treasurer of the State a "tax of one per centum on the cost of the said road, to be paid "annually on the 1st Monday in January. Provided, that no "other tax or impost shall be levied or raised from said cor-"poration, by virtue of any law of the State;" and the question was whether such tax provision protected the company against a subsequent tax law of the State, and both the Supreme Court and the Court of Errors and Appeals sustained the charter tax.

In case of State vs. John B. Haight, 34 New Jersey R., the New Jersey Railroad and Transportation Company was authorized to build a railroad from New Brunswick to some point on the Hudson river, opposite the City of New York.

By the 18th section of the Act of incorporation the company was required to pay into the State treasury a certain per centum upon the capital stock of the company, and an exemption was granted from all other taxation, with the proviso that in addition to such a tax, if at any time any railroad should intersect or join to said railroad so as to make a continuous line of railroad, carrying passengers across New Jersey, between New York and Pennsylvania, then the treasurer of said railroad should make quarterly returns of number of passengers and number of tons of freight transported over the railroad to the State Treasurer, and thereupon should pay to the State eight cents for each passenger, and twelve cents for each ton of freight transported as aforesaid.

The authorities of Jersey City levied a tax on the boats of the company carrying passengers and freight between Jersey City and New York. This was an action to test the validity of the tax.

Dalrimple, J., delivering the opinion of the Court, on page 321, says:

"I think the exemption from tax, except in the mode prescribed, extends to all the property of the company properly represented by its capital stock, and which is used for the transportation of freight and passengers on the route between New Brunswick and New York, whether upon land or water. The object which the Legislature had in view was to provide the means of transportation from New Brunswick to the Hudson river opposite New York, and eventually between New York and Pennsylvania.

"To that end provision is made to exempt the prosecutors from all local taxes on property, the use of which is required to carry out the objects of the Act of incorporation.

"This tax having been levied on the boats of the company, which were necessary for the transaction of their legitimate business, and which are represented by capital stock of the company, is illegal and must be set aside."

In Richmond vs. Richmond and Danville R. R. Co., 21 Gratton (Va.) R., 604, the city of Richmond taxed the real estate of the railroad situate in the city of Richmond for taxes for the years 1865 and 1866. The company refused to pay it, and the tax was levied upon a locomotive belonging to the company to enforce the collection of the same. The company sued out an injunction to restrain the city and collector from enforcing the same.

The point made in defense was, that by the charter of the railroad all of its property was exempt from taxation.

The city of Richmond answered and insisted—

First. That the exemption was only from State and not municipal taxation.

Second. That if it was intended to include municipal taxa-

tion it was void as to the city of Richmond, which was incorporated before the railroad company, by its charter was authorized to levy a tax upon all real and personal property in the city, to borrow money and execute bonds, and that upon the faith of this power had incurred liabilities, and that the same could only be met by taxation upon all the property it had the power to tax. The case was heard and the injunction made perpetual.

On appeal, Staples, J., on page 607, says:

"It is insisted that it was not the intention of the Legisla-
"ture to change the legal character of the property held by the
"company, but merely to define the nature of the shares therein;
"and that such shares only are exempt, and not the property
"of the corporation. The section of the charter referred to is
"as follows: All machines, wagons, vehicles or carriages be-
"longing to the company, with all their works and all profits
"which shall accrue from the same, shall be vested in the re-
"spective shareholders forever, in proportion to their respect-
"ive shares,and shall be deemed personal estate and exempt from
"any charge or tax whatsoever.

"Very slight consideration of this language will show that
"the construction sought to be placed upon it, is too restricted.

"The Legislature, clearly, did not mean to declare that the
"shares should be vested in the shareholders, and should be
"deemed personal estate. Such a provision in regard to the
"shares was wholly unnecessary. The obvious meaning is,
"that the property designated—that is, the machines and car-
"riages belonging to the company, 'with all their works'—
"should be deemed personal estate and exempt from any charge
"or tax whatsoever. If authority upon this point were neces-
"sary, it may be found in the case of the '*Mayor, &c., of Balti-
"more, vs. Balt. & Ohio R. R. Co.*, 6 Gill's R., 288.' It was
"held in that case that the real and personal property of the
"company was exempt from taxation, under a clause in the
"charter which provided that the shares of its capital stock
"should be deemed personal estate, and exempt from the im-
"position of any tax or burden.

"The Court say, the design contemplated by the Legislature, "in the insertion of that clause, *was to confer a substantial, not* "*a nominal benefit on the stockholders, and to induce capitalists to* "*risk their money in a novel and hazardous enterprise.*

"To impute to the Legislature in the case before us an in- "tention to exempt the shares of stock from taxation, and at "the same time to reserve the right to tax everything which "constituted it a stock and gave it its value, would be gratui- "tously to cast an imputation upon the Legislature, inconsist- "ent with every principle of judicial courtesy.

"It was also insisted that the clause in question does not "have the effect to exempt the real estate of the company or "in any manner to change it into personal property.

"The correctness of this proposition depends upon the con- "struction of the phrase, 'with all their works.' The word "'works' is one of very extensive signification. In military "engineering it means fortresses, fortifications, ramparts, bas- "tions, and the like. In civil engineering it is often applied "to depots, engine houses, bridges, embankments and other "structures essential to the franchise and the proper conduct of "a railway or other work of public improvement. It is very "clear that it is in this sense the word is used in the present "charter, and was intended to apply to all the property, real "and personal, owned by said company and necessary to the "management of the road. If the exemption does not em- "brace the real property of the company, the Legislature has "perpetrated the folly of declaring that mere chattels should "be deemed personal estate.

"It would be attributing to the Legislature the grossest in- "consistency, to suppose it intended to release from all taxa- "tion the machinery and rolling stock of the company, and "leave it exposed to the burdens of taxation of its depots, en- "gine houses, coal yards, and other necessary structures. The "consideration which dictated the exemption of the personal "property equally applied to the reality."

In Union Bank vs. State, 9 Yerger, 489, Judge Turley, in

an able and exhaustive opinion, delivered long anterior to the granting of these charters, defines the term "capital stock" as identical with the property in which it is invested.

In New Haven vs. City Bank, 31 Conn., 108, the City Bank was chartered in 1831, and by its charter it was provided that if it would subscribe $100,000 to the Hampshire and Hampden Canal Corporation, *its capital stock* shall be and remain free from taxation until the tolls received shall reach a dividend of six per cent. on the capital stock, after which time it shared a like tax with other bank stock.

The subscription was made, and the tolls have never paid a dividend of six per cent.

In 1851, the bank, owning no banking house, bought a lot and erected a suitable building out of the capital stock, which it is still occupying, and it could return its capital stock to the owners without a sale of the banking house—a portion of the house was not used for banking purposes, and was being rented out.

In 1854 the Legislature provided that any real estate owned by a bank and not used for its proper business, should be liable to taxation as other real estate, and in 1860 that portion of the property not used by the bank was assessed for taxation, and this question was alone submitted.

Sandford, J., on page 109, says: "The only question between "the parties is, what is the 'capital stock' thus exempted?"

In speaking of the bank, the same Judge, on same page, says: "All its property, its capital, its stock, was contributed "by individual subscribers, from their private funds, and was "by them intrusted to its keeping and management, for their "benefit, taking from it no tangible property in return— "nothing but the evidence of their contributions and their con- "sequent interest in the common fund, or capital stock, thus "contributed."

"Originally, then, 'the capital stock of the bank' was all "the property of every kind, everything which the bank pos- "sessed. All this 'capital stock,' all of it, in reality belonged

" to the contributors, it being intrusted to the bank to be used " and traded with for their exclusive benefit; and thus the " bank became the agent of the contributors, so that the trans- " mutation of the money originally advanced by the sub- " scribers into property of other kinds, though it altered the " form of the investment, left its beneficial ownership un- " affected; and every new acquisition of property, by exchange " or otherwise, was an acquisition for the original subscribers " or their representatives, their respective interests in it all " always continuing in the same proportion as in the aggregate " capital originally advanced. *So that, whether in the form of* " *money, bills of exchange or any other property in possession or in* " *action into which the money originally contributed has been* " *changed, or which it has produced, all is, as the original con-* " *tribution was, the capital stock of the bank, held as the original* " *contribution was, for the exclusive benefit of the original contrib-* " *utors and those who represent them.*

" The original contributors, and those who represent them, " are the stockholders; each one of them holds an undivided " portion of the entire stock, and, together, they hold the en- " tire stock of the corporation. The stock certificate which " each of them holds is the muniment of his title, specifying " his proportion of interest in all the property of the corpora- " tion, and all these stock certificates together represent the en- " tire property of the bank in whatever form it may exist.

" By the terms of the charter, the capital stock of the bank " was to consist of five thousand shares, of one hundred dollars " each. Had that amount been subscribed, and at once paid " in, the money so accumulated would have been the capital " stock of the bank, and as such exempted from taxation. And " when one hundred thousand dollars of the money thus " accumulated had been paid out by the bank on its subscrip- " tion for stock of the Hampshire and Hampden Canal Corpo- " ration, that canal stock took the place of the money paid for " it, and became *pro tanto* capital stock of the City Bank, and " exempt, as the money was, from taxation.

" And so, when afterwards, for debts previously contracted,

" houses, lands, or goods were necessarily taken in payment, " such houses, lands, or goods became, in lieu of the money for " which they were received, part of the capital stock, and en- " titled to the same exemption. Otherwise the canal stock thus " purchased, and the houses, land and goods thus acquired, " might be taxed, and thus the promised exemption, purchased " by the shareholders, and assured to them by the charter, " would be rendered worthless and delusive.

" We see no reason for a distinction in this respect between " real estate so taken by the bank in payment of a debt and " the real estate which is the subject of this controversy.

* * * * * * * *

" The entire cost of the building was paid, and properly " paid, out of ' the capital stock ' existing in the form of money, " and thus the building became what the money paid for it " was—capital stock in its stead.

" In putting on the second story of the building the Directors " may have made an unprofitable or otherwise ill-advised in- " vestment of the stock, but of such investment, unless it was " illegal, none but the stockholders can complain.

* * * * * * * *

" But the primary object of the bank in erecting the build- " ing was the accommodation of the proper business of the " bank, and the temporary renting of the room was but an in- " cident to the ownership, neither affecting the title to the " property nor the right to hold it free from taxation.

" We are satisfied that the property in question is to be re- " garded as a part of the capital stock of the corporation, and " therefore exempted from taxation by the express provisions " of the charter.

" We cannot, in the absence of explicit declarations to that " effect, impute to the Legislature an intention to provide " merely that the shareholders should be individually exempt " from taxation on account of their respective interests in the " property of the bank, while it retained the power and right " to assess and tax all or any portion of that property against " the bank itself; such reservation of right would render the " promised exemption a worthless figment.

"But it is said there is an obvious distinction between the "real property of a corporation and the shares of capital stock "in the hands of its stockholders, and we may add that there "is the same difference between the *personal* property of the "corporation and its stock in the hands of its stockholders, "but this consideration goes but a very little way, if at all, "toward the solution of the question now before us. That "question is whether the promised exemption, which con- "fessedly covers the intangible ideal rights, called shares, in the "hands of the stockholders, covers also the property, real and "personal, in which the whole value of those shares consists; "whether it is possible to impose a tax upon the latter without "having the entire burden of the imposition fall upon the "former; and if it is not, whether the construction contended "for by the town can be the true construction of the grant. "And for the purposes of this question we can see no difference "between the real and personal property held by the corpora- "tion. The shares of capital stock cover and include them "both."

In Hannibal and St. Joseph R. R. Co. vs. Shacklett, 30 Missouri, page 550—

The railroad company brought suit to recover from Shacklett, the tax collector, $615.86 paid by it as taxes on its real and personal property, on the ground that the property taxed was used and necessary to operate the road and was exempt from taxation; that the assessment was void, and that the collector having levied for said tax on its property, it paid the same under protest, and brings this action to recover it back.

A demurrer was interposed and sustained, and an appeal taken by the railroad company.

Napton, J., on page 558, says:

"Confining ourselves entirely to the railroad corporation "whose property in this case has been subjected to taxation, "without undertaking to give any construction to the law with "reference to corporations of a different character, the question "is, upon this provision of the general revenue law, whether "the road-bed, machinery, depots, and other property used by

"the company are to be considered as a part of the capital "stock of the company. It is undoubtedly not literally the "capital stock, taking these words in their usual acceptation. "*Capital stock, in its strict signification, exists only nominally;* "*the money or property which it represents is the tangible reality.* "The one is the representative of the other, and if the stock "and the property it represents are both taxed, the taxation is "double."

The Supreme Court of the United States, during the present term, in the cases of the Union and Planters Bank, and De-Soto Bank vs. The State of Tennessee, where the exemption was as follows: "Said institution *shall pay to the State an an-* "*nual tax of one-half of one per cent. on each share of the capital* "*stock, which shall be in lieu of all other taxes whatever,*" held that the tax on the shares, paid by the bank, exempted the shareholders from a tax on their individual shares, and reversed the decision of the Supreme Court of Tennessee.

How evident, then, is it that if the State exempts the capital stock, that it cannot tax the property bought therewith; what would the exemption of capital stock *forever* amount to, if all of its property were taxable?

The Supreme Court of the State, in deciding this case, met this question, we think, unfairly, in the light of the above authorities; and we respectfully submit, its decision and opinion is in conflict, not only with the spirit of the legislation which prompted the granting of these charters, but with the entire adjudication, not only of the State of Tennessee, but of the several States of the Union, as well as the Federal Courts.

Judge McFarland, delivering the opinion of the Court, says: "That the term capital stock in general was the meaning con- "tended for, *as distinguished from the shares of the stockholders,* "*is well established by authority;* and it may be further conceded "that had the 38th Section contained the provisions forever "exempting the capital stock, *without more*, this exemption "would extend to and embrace any property representing the "capital stock—as the road itself, and fixtures." Now, we defy the counsel for the State to produce any well-adjudicated

case, or respectable authority, where a different construction is given to the term, "capital stock." The Legislatures themselves, in passing the charter of the Memphis and Charleston Railroad Company, in its 2d Section (see Schedule No. 1, p. 3,) define capital stock. It reads as follows:

"Books for subscription of eight hundred thousand dollars, "*the capital stock of said company*, shall be opened," etc.

The Legislature, fully aware of the necessity for these railroads and the inability of the people of the State to build and equip them, and in order to get foreign capital to take hold of them, says: You, my citizens, take $800,000 of the stock, and this or the property in which it is invested, shall be forever exempt. This, I know, is largely insufficient to build it, but you may borrow as much money as you choose on mortgage, and this I will also exempt for twenty years. By this means, upon an exemption of $800,000, I will get a capital and property not now in existence of several millions, which will in years to come produce large revenues; and in same charter (in Schedule No. 1, section 17, page 8,) it expressly provides "that the company may increase its stock or raise money on mortgages to any extent its stockholders may agree to," and the M. & C. R. R. Co. increased its stock to $5,312,725 and raised on mortgages $4,249,000 (See Record, p. —), and the Mobile and Ohio Railroad Company stock is $5,320,600, and its mortgage debt is $12,046,667.05. (See Record, p. —.)

Here, then, while the "capital stock" exempted under this contract amounts to $10,633,325, the State gets a taxation upon property represented by the mortgage debt of $16,295,667.05 on these two roads alone.

The Court below, in deciding this case, proceeded upon the erroneous idea that these roads were built and equipped alone with capital stock. The following is the relative amounts of capital stock and mortgages—money that went into the construction and equipment of these roads:

	Capital Stock.	Mortgages.
Mem. & Charleston R. R. Co.....	$5,312,725	$4,249,000 00
Mobile & Ohio R. R.....	5,320,600	12,046,667 05
Total exempt	$10,633,325	Total taxable, $16,295,667 05

Their charters both expressly gave them an unlimited power to borrow money. What for? To bank on? No. To build hotels or canals? No. To speculate in bonds and stocks or engage in mercantile pursuits? No. What for, then? Only to build the roads contemplated by their charters and equip them. What was to be the restriction on their power? Only their necessities, and this regulated by the will and consent of the owners of the capital stock.

Did the Legislature then contemplate any purchases by and improvements upon these railroads from this borrowed money, or was it to be borrowed without any object or benefit in view to the railroads?

The question needs no answer.

Then the perpetual exemption of capital stock from taxation really did mean something. Suppose, now, you substitute the legal and well established definition of "capital stock," as interpreted by all the law writers and Judges, in the 38th Section of the charter in lieu of the term "capital stock," and see how it reads:

"The property, real, personal and mixed, including road, roadbed, cars, locomotives and fixtures necessary for and used in operating the railroad, bought with the 'capital stock' of the company and represented by it, shall be forever exempt from taxation; but the road, with all its fixtures, including workshops, warehouses and vehicles of transportation, shall be exempt only for twenty years from the completion of the road."

Now, the Court in construing this would have no trouble, as it could and would say, that it is our duty to reconcile these sections, *if possible*. We see by the charter the road has so much capital stock. It has the unlimited power to borrow on mortgages. So much of the road as is paid for out of capital stock is forever exempt, and the balance is liable to taxation after twenty and twenty-five years. Here is a reconciling of both sections and provisions. It must reconcile and let all stand if possible.

We cite a few of the many railroad charters granted from

1835 to 1861, all containing identically the same exempting clauses, and all using the words, "capital stock," in the same sense as that on which we insist.

See charters, as follows :

RAILROADS.	ACTS.	PAGE.	SEC.	
LaGrange & Memphis,	1835	—	25	same exemption as M. & C. R. R. Co.
Nash. & Chattanooga,	1845-6	27	38	" " " " " " "
Mem. & Charleston,	1845-6	275	38	" " " " " " "
Mobile & Ohio,	1847-8	181	11	" " " " " " "
Tennessee Central,	1847-8	193	48	" " " " " " "
East Tenn. & Virginia,	1847-8	205	30	" " " " " " "
Western & Atlantic,	1847-8	330	1	" " " " " " "
Nash. & Northwestern,	1851-2	91	36	" " " " " " "
Hamilton & Harrison,	1849-50	144	19	" " " " " " "
Tennessee & Alabama,	1851-2	9	1	" " " " " " "
Winchester & Ala.,	1849-50	169	6	" " " " " " "
Chat., Har'n & Cleve.,	1849-50	477	1	" " " " " " "
Shelbyv'e & Columbia,	1851-2	505	35	" " " " " " "
Nash., Fra'klin & Col'a,	1857	273	1	" " " " " " "
Pikeville & Jasper,	1851-2	187	1	" " " " " " "

In fact, all of the charters granted through a period of thirty years, with a few exceptions, contained exactly the charter exemptions relied upon by us in this cause.

Now the Supreme Court of the State says, notwithstanding the identical language has received a judicial construction in the 9th Yerger case before the passage of these charters, and notwithstanding the Legislature has continued through a period of thirty years to employ such language in nine-tenths of the roads chartered, yet they meant nothing, and intended to convey no right by the use of the words "capital stock shall be forever exempt."

The case of the Union Bank vs. State, 9 Yer., 449, decided prior to the granting of all these charters, defines the terms, "*capital stock*" as identical with the property in which it is invested.

This long and repeated legislative construction of these terms, independent of the decision just quoted, is of controlling force in fixing the meaning of these words.

But the prior decision is absolutely controlling. When the terms of a statute, which "have received a judicial construction,

" are used in a latter statute, that construction is to be given in " the latter statute. It is to be presumed in such case that the " Legislature, who passed the latter statute, knew the judicial " construction which had been placed on the former one, and " *such construction becomes a part of the law.*"

Potter's Dwarris on Statutes, p. 274, Note 4.
Commonwealth vs. Hartwell, 3 Gray R., 450.
Ruchmaboye vs. Motchmed, 32 Eng. L. & Eq., 84.
Bogardus vs. Trinity Church, 4 Sand. Ch., 633.
Rigg vs. Wilton, 13 Ill. R., 15.
Adams vs. Field, 21 Vermont R., 256.

In our own Supreme Court in the case of The State vs. Schlier, 3 Heiskell, 283, Judge Nicolson says, speaking of this subject:

"Such was the fixed judicial interpretation of the word " 'privileges' when the Convention of 1870 adopted exactly " the same language in forming the present Constitution. It " was adopted with a full knowledge of the meaning which " had been attached to it by the Courts. This is conclusive as " to the present interpretation to be placed upon it."

We may say truly, and with accuracy, that the settled meaning in American law of the term, " *capital stock,*" is that it is the fund paid in by the stock subscribers, and is invested in and identical with the property bought with this fund.

The second clause of this exempting Section 38, is in seeming contradiction with the first clause, if taken literally, but we confidently invoke the following cardinal rules of construction as of controlling force to produce that interpretation, which will sustain and harmonize both clauses:

" It is a cardinal rule of construction, *that effect is to be given,* " IF POSSIBLE, *to every clause* and section of a statute; and it is " the duty of a Court, *as far as practicable,* so to reconcile the " different provisions as to make the whole consistent and har- " monious."

Sedgwick on Con. and Stat. Lim., p. 200,201.
Potter's Dwarris on Statutes, p. 189, 187.
Wilcox vs. State, 3 Heisk. R., 113.

But it is said the last clause of Section 38 expressly limits the duration of the exemption from taxation, as to the road and its appurtenances and fixtures, to twenty years from the completion of the road.

We reply, that if this is construed according to its letter, as interpreted by the Attorney-General, it wholly destroys the first clause, for, to tax the road, its fixtures and appurtenances, is to tax the capital stock.

In construing a statute, the whole must be considered; the different statutes reflect light on each other.

Sedgwick Statutory Law, 237–8.

It is the duty of the Court, if possible, so to construe both clauses as to sustain both.

37 N. J., 233–4.

In construing these laws, it has been truly stated to be the duty of the Court to effect the intention of the Legislature; but this intention is to be searched for in the words which the Legislature has employed to convey it.

Sedgwick Const. Law.

Potter's Dwarris on Statutes, 207–8–9.

7 Cranch, 52–60.

In State Morris and Essex R. R. Co. vs. Commissioners, 34 New Jersey, page 233, the Court, in passing upon the rule of construction applicable to such apparent conflicts as are raised here, says:

"Where there is a particular enactment and a general enact-
"ment in the same statute, and the latter in its most compre-
"hensive sense would include what is embraced in the former,
"the particular enactment must be operative, and the general
"enactment must be taken to take effect only such cases within
"its general language as are not within the provisions of the
"particular enactment. This, in substance, is a rule of con-
"struction adopted by Sir John Romely, M. R., in Pretty vs.
"Sally, 26 Beavan, 610, and Dewington vs. Mayor of Breton,

"same, 533, and is nothing more than another form of giving "expression to the principle that the general legislation on a "particular subject must give way to special legislation on the "same subject.

"But this rule is subordinate to the cardinal principle for "the construction of statutes, *that they are to be so construed "that if possible full effect shall be given to all parts of the statute.*

"This latter rule must be applied to ascertain wherein lan- "guage *which is specific* necessarily comes in conflict with other "language which is general. The effort *must*, in the first in- "stance, be to harmonize all the provisions of the statute by "construing all parts together, and it is only *when* on such "construction the repugnancy of specific provisions to the gen- "eral language is plainly manifested that the intent of the "Legislature, as declared in the general enacting part of the "statute, is superseded."

With the meaning of the terms, "capital stock," thus conclusively settled, and with the foregoing rules of construction in view, we recur to the consideration of the two exempting clauses.

The Attorney-General in the Court below admitted the settled meaning (in the judicial and legislative vocabulary) of the words, "capital stock," to be, the fund paid in by the stock-subscribers, and that it is identical with, and represented by, the property bought with it. He also admits the correctness of the rules of construction hereinbefore given; but he says, "the meaning of the words of the second clause (to-wit: 'the road, with all its fixtures and appurtenances, including workshops, warehouses, and vehicles of transportation, shall be exempt, etc.,') cannot be mistaken; it is indisputable; and as to the words capital stock, although they have a well-understood and settled meaning in judicial and legislative parlance, yet, common-sense people, sometimes, use them in the sense of shares of stock in the hands of the shareholders; therefore, this Court will determine that the Legislature so intended to use them, and thus reconcile the two clauses.

We reply, first, the Court has no evidence that common-sense people ever use those words in the sense of shares in the hands of shareholders, except the unsupported "*ipse dixit*" of the Attorney-General. To which *ipse dixit* we, with perfect sincerity and candor, oppose our *ipse dixit*. We deny that common-sense people ever so use those words. Thus your Honors have one *ipse dixit* opposed to another.

Secondly, the Attorney-General asks your Honors (in the face of the unmistakable and settled meaning of these words, "*capital stock*," and on the slim authority of his saying, "common-sense people sometimes use them in a different sense,") to substitute in the first clause the words, *shares of stock* for *capital stock*, and thus entirely erase and blot out this first clause, and substitute another: and this, he says, you must do, because there is no doubt about the grammatical sense of the words of the second clause.

We reply, we have shown that the settled meaning of the words, capital stock, is the funds paid in by the subscribers, and identical with the property bought with it. This meaning is as well settled and clearly fixed as the words "*road, fixtures, appurtenances, vehicles of transportation*," used in the second clause.

There is no more doubt of the grammatical sense of the words in the first clause than of those in the second clause.

It is asked that the Court shall, upon a purely fanciful notion, erase the words of the first clause and substitute a wholly different. We ask, not to erase the second clause, but simply to limit its meaning so as not to conflict with the first clause Looking to the 2d, 12th and 17th sections of the charter we see that the company were authorized to raise one fund, the capital stock, by subscription, and another fund by borrowing money. Both funds could be and were applied to buying of the property of the road. Then taking the first clause as covering all the property to the amount of the capital stock, the

second clause will still apply to the property bought with the borrowed fund.

Central R. R. Co. vs. McLean, 40 Ga., 646.

Hannibal and St. Joseph R. R. Co. vs. Shacklett, 30 Mo., 550.

In the case in 40 Ga., page 650, the charter of those railroads provided that "no municipal or other corporation shall "have power to tax *the stock* of said companies, but may tax "any property, real and personal, of said companies within the "jurisdiction of said corporation in the ratio of taxation of "other property." *This seemed to give such municipal corporations full power to tax all such property by the very clause under which the exemption was claimed*, and yet Warner, Judge, held, and properly so, that it only embraced such property as was not used for corporate purposes, *and such as was not properly covered by the term capital stock.*

In 30 Missouri Reports, at page 557, the Court says: "What description of property was intended to be embraced "by the words 'all properly owned by incorporated companies "'over and above their capital stock,' it must be con- "ceded it is not very plain, especially when made appli- "cable to railroad corporations. The difficulty is not di- "minished by taking into consideration the additional pro- "visions which enumerates 'shares of stock' as another sub- "ject of taxation. It is certainly implied that capital stock is "to be regarded as property, and that a corporation may have "more property than the capital stock represents. It is not "designed that the property which is represented by capital "stock shall be taxed, but the property which is owned *over* "*and above* the 'capital stock.' It is clear that there was no "intention of taking both the capital stock and the property "which was over and above capital stock. It is only the last "which is taxed, and the former is expressly exempted."

We repeat, as a *controlling* consideration, that unless the Court adopts the construction we insist on, it renders nugatory and totally destroys all value in the perpetual exemption from

taxation of the capital stock. That the Legislature meant something by this perpetual exemption for the capital stock, is clear, as it is contained in all three of the charters under consideration, as well as in probably one hundred other charters.

But, again, for the sake of the argument, suppose we admit that the Attorney-General is right in the interpretation of the first clause, then we submit that the Supreme Court of the United States and of this State have decided that the exemption of the shares of stock in a charter includes also an exemption of the capital stock, and *vice versa*. So, to substitute the words he wishes, would still leave the capital stock exempted, and the Court must still construe and reconcile them.

In Bedford vs. Mayor of Nashville, 7 Heiskell, 413, Judge McFarland says: "Now by this law the capital of the corporation is exempted, and in its place the tax is divided amongst the shareholders; it is the same thing in a different shape."

See, also—

DeSoto Bank and others vs. State, MSS., U. S. S. C., present term.

We add, that these charters are entitled to a liberal construction, because, at the time of their passage, the people and the Legislature were strongly moved by an all-pervading wish to induce capital to build lines of railroad through the State as a great public necessity and benefit. In this spirit these charters were granted. A wholly different temper is abroad now, but this should not reach or affect the Courts.

The same argument is applicable to the 11th section of the Act of 1875. The railroads did not seek that Act; the State voluntarily offered it to the companies; the companies simply accepted it in good faith, and paid the tax bargained for, for two years. They cannot recover it back, because they voluntarily paid it, waiving the constitutional objection. The Courts should not estop the State, but should be most thoroughly convinced of the unconstitutionality of this Act before declaring it void.

The Supreme Court of this State, in passing upon the claim of the Knoxville and Charleston Railroad to the same exemptions as are claimed by the Nashville and Chattanooga Railroad, says: "The remaining question arises upon the charter of the "Knoxville and Charleston Railroad Co., containing these "words—'Said company is hereby invested for the purposes of "'making and using said road with all the rights, powers and "'privileges, and subject to all the liabilities and restrictions "'that have been conferred and imposed upon the Nashville "'and Chattanooga Railroad Co. in its original charter.' The "question is, is this sufficient to clothe the company with the "immunity from taxation contained in the charter of the N. & "C. R. R. Co.?

"We held such language was not sufficient in a case almost "precisely similar to this, the case of the Miss. and Tenn. R. "R. Co. We also held against the exemption in the case of "Hamlin Co. vs. the East Tenn. and Va. R. R., which was a "stronger case in favor of the exemption than this. Here the "company is vested 'for the purpose of making and using said "'road,' with the powers, rights and privileges of the former "company. In the case referred to, the new company was "vested with all the rights, powers and privileges of the former "company, without the apparently qualifying words—'for the "'purpose of making and using said road.' We held that the "words 'rights and privileges' did not embrace an exemption "from taxation. We are asked to reconsider this question, in "view of the decisions of the Supreme Court of the United "States, to which our attention was not then called. This be-"ing a question where the Supreme Court of the United States "has revisory jurisdiction, it is our duty to conform our decis-"ions to the rulings of that tribunal, and we should cheerfully "do so in this instance if satisfied that the question had been "considered and directly decided; but in looking to the cases "referred to, it seems to us that this question *was taken for* "*granted*, and not directly made or considered. The case appar-"ently bearing more directly on the question is Humphreys vs. "Pegues, 16 Wallace.

"We frankly admit, as we did in the former case, that the "words 'rights and privileges,' by a liberal, or probably a fair "construction, might be held to include an exemption from "taxation, as an exemption may be said to be both a right and "a privilege."

Now we respectfully insist that the above ruling of the State Supreme Court is at least very improper, for it is true, as it admits, that it being a Federal question, it should be decided according to the Federal decisions; and whether this Court decided the case advisedly or unadvisedly, and with or without consideration, we respectfully say that the decision must be binding and conclusive on the Courts of the State, and that any review of the findings of this Court by the inferior Courts is, to say the least of it, in exceeding bad taste.

The cases referred to are Humphreys vs. Pegues, 16 Wallace, 244, and Morgan vs. Louisiana, 3 Otto, 224.

In the first case the Cheraw and Darlington Railroad Company, incorporated in 1849, had not on the 19th day of December, 1864, completed its road, and on that day the Legislature amended its charter, as follows:

"That all the '*powers, rights and privileges*' granted by the "charter of the Northeastern Railroad Company are hereby "granted to the Cheraw and Darlington Railroad Company." And the exemption of the Northeastern road was that the stock and the real estate that it now owns or hereafter acquires which is necessary for its corporate purposes are forever exempt from taxation.

Hunt, Judge, delivering the opinion of the Court, on page 247 says:

"All the privileges, as well as the powers and rights of the "prior company, were granted to the latter. A more import- "ant, or more comprehensive privilege than a perpetual immu- "nity from taxation, can be scarcely imagined; and he held "that the immunity from taxation passed under the term rights "and privileges to this company by reference to the charter of "the other railroad."

In Morgan vs. Louisiana, 3 Otto, page 224, Field, J., says: "Immunity of particular property from taxation is a privi-"lege which may sometimes be transferred by that designation, "as held in Humphreys vs. Pegues, 16 Wallace, 224."

Now as to the definition of the word "privilege": Bouvier says—"The word taken in its actual sense, is a particular law, or a particular disposition of the law, which grants certain special prerogatives to some persons contrary to common right."

Tomlin, in his Law Dictionary, defines "privilege": "Privilege is an exemption to a private individual, or corporation, from the rigors of the common law. It is sometimes used in law for a place which hath some special immunity."

Worcester, in his Unabridged Dictionary, thus defines it: "Privilege—An exemption or immunity from some general duty or burden; a right peculiar to some individual or body; a peculiar advantage or benefit."

Our Supreme Court, in Mabry vs. Tarver, 1 Humpreys, 98, thus defines "privilege": "But it is contended that the avo-"cations in question are not in themselves, and in their nature, "privileges. They are not so, indeed, unless prohibited in gen-"eral by the law; but when so prohibited, the license or per-"mission to pursue them becomes a privilege."

To be allowed to operate a railroad is a matter of right common to all of the citizens of the State, but to be allowed to operate such road free from taxation and to the exclusion of any other person, is a "privilege."

We therefore insist that the charter rights of the Knoxville and Charleston R. R. Co. are identical with those of the Nashville and Chattanooga R R. Co., so far as its exemptions from taxation are concerned.

The Mobile and Ohio Railroad Company, in addition to the perpetual exemption of capital stock, and the exemption of the road and fixtures for twenty-five years, has the further exemp-

tion, to-wit: "And no tax shall ever be laid on said road or its "fixtures which will reduce its dividends below eight per "cent."

Now, we insist that the language of this exemption creates an absolute, undeniable exemption of everything for twenty and twenty-five years from the date of the completion of the respective roads, and after this period, the "*road and its fixtures,*" of the Mobile and Ohio Railroad, shall pay no tax whatever "which will reduce the dividends below eight per cent."

In Raleigh and Gaston Railroad Company vs. Reid, 13 Wallace, 269, the property was exempted absolutely for fifteen years, and after this limitation had expired, the Legislature was at liberty to tax the individual shares of the stockholders whenever their annual profits exceeded eight per cent., provided that the tax did not exceed twenty-five cents a share per annum; and the pleadings show that such a profit as eight per cent. had never been realized. Mr. Justice Davis, in delivering the opinion of the Court, p. 270, says: "The only way in which the "property of this company could be reached for taxation at all, "was after the limitation of fifteen years had expired. The "Legislature was then at liberty to tax the individual shares "of stockholders whenever their annual profits exceeded eight "per cent. *When a statute limits a thing to be done in a partic-*"*ular mode, it includes a negative of any other mode.* * * "* * * As the pleadings show that the annual "profits of the shares of stock have never reached eight per "cent., it follows that they were not subject to any public "charge or tax."

In Pacific Railroad Co. vs. McGuire, 20 Wallace, 39, the exemption was, that the company shall be exempt from taxation until completed, opened and in operation, and shall declare a dividend, when the road, with its fixtures, etc., should be taxed at a cash value, in the same manner as other property of like value. If, however, no dividend was declared within two years from the completion of the road, then the exemption should cease.

Hunt, J., in delivering the opinion of the Court, says (on page 42):

"Upon the facts presented by the agreed case before us, we "are of opinion—

"1st. That the 12th section of the Act of 1852 created a "contract between the State and the railroad company, by "which the railroad was exempt from taxation until it was "completed and put in operation, and until it should declare a "dividend on its capital stock—not, however, extending longer "than two years after its completion.

"2d. That the ordinance of 1865, imposing a tax of ten per "cent. upon its gross earnings before the road was completed "and in operation, and had declared a dividend, was a viola-"tion of this contract, and that the levy for its enforcement "was illegal."

In Knoxville and Ohio R. R. vs. Hicks, MS., Knoxville, September Term, 1877: "The capital stock and dividends, road and fixtures," were exempt by charter granted on 25th February, 1856, "until the stock paid a dividend equal to the legal rate of interest," and the Court unanimously held that it was a valid contract, and the dividends never having been declared, the road was exempt until the happening of that event.

These cases are conclusive of the exemption claimed until such a time as the net proceeds from the earnings of the Mobile and Ohio railroad pay a dividend of eight per cent., and until the expiration of twenty and twenty-five years from the date of the completion of the several roads.

It will hardly be necessary to argue the last proposition as to how far the Acts of 1875 and 1877 impair the charter contract of complainants. If the Court holds the Act of 1875 unconstitutional as to its 11th section, then all of complainants stand on the same footing, and the exemptions claimed are to be determined only by the extent of the particular exemption as defined by the language used, and the provisions of the Act of 1875 taxing the Memphis and Charleston R. R. Co., contravenes its rights, as it is not liable to any tax until 28th of October, 1877, under the twenty year provision of its charter.

There can be no doubt that if the 11th Section of the Act of 20th of March, 1875, is constitutional, that the Memphis and Charleston R. R. Co. has abridged its exemption to ten years, and the Act of 1877 is violative of its obligations so far as this road is concerned; and as to the Mobile and Ohio and Knoxville and Charleston R. R. Companies, we insist that both the Acts of 1875 and 1877 are at total variance with the duty, good faith and solemn contracts of the State, as contemplated in the original charters granted them, and should be perpetually enjoined

HUMES & POSTON,

Counsel for M. & C. R. R., and Mobile & Ohio, and Knoxville & C. R. R. Companies.

SCHEDULES

TO

BRIEF OF HUMES & POSTON,

BEING

ACTS OF THE GENERAL ASSEMBLY

OF THE

STATE OF TENNESSEE,

Chartering the Memphis and Charleston, the Mobile and Ohio, and the Knoxville and Charleston Railroad Companies,

AS WELL AS

THE GENERAL ACTS LEVYING TAXES UPON SAID ROADS,

AND

ALL OTHER RAILROADS IN THE STATE.

SCHEDULE 1.

An Act to incorporate the Memphis and Charleston Railroad Company.

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee,* That for the purpose of establishing a communication by railroad between Memphis, Tennessee, and Charleston, South Carolina, the formation of a company is hereby authorized, which, when formed, shall be a body corporate by the name and style of the "Memphis and Charleston Railroad Company;" and by said corporate name shall be capable in law to buy, receive by gift, hold, sell and convey real and personal estate, as hereinafter provided; make contracts, sue and be sued, to make by-laws, and to do all lawful acts properly incident to a corporation and necessary and proper to the transaction of the business for which it is incorporated: and to have and use a common seal, and the same to alter and destroy at its pleasure; and shall have perpetual succession of members.

SEC. 2. Books for subscription of eight hundred thousand dollars, the capital stock of said company, in shares of twenty-five dollars each, shall be opened on the first Monday in March, 1846, and shall be kept open for six days between the hours of ten o'clock in the morning and four o'clock in the evening of these days, at the following places, and by the following Commissioners, to-wit: at Memphis, by Robert C. Brinkley, Lewis Shanks, Robertson Topp, E. J. Shields, John K. Chester, Edwin Hickman, W. W. Hart, Wyatt Christian, G Gholson, H. H. Means, P. G. Gaines, Mat. Anderson, Reuben L. Kay, Charles Lofland, Seth Wheatley, Henry G. Smith, M. B. Winchester, Wardlow Howard, George W. Smith, Dr. Dudley Dunn, James F. Leath, John Delafield; at LaGrange, by John

J. Potts, Thomas B. Firth, John W. Burton, E. W. Harris, C. Michie and Thomas Polk; at Somerville, by B. Douglass, Levin H. Coe, Robt. J. Yancey and Lewis P. Williamson; at Bolivar, by Pitser Miller, William O. Fergerson, J. J. Williams, Horace Polk, John H. Bills, C. H. Horion, Calvin Jones and C. P. Polk; at Purdy, by W. J. Wisdom, James Reed, Alfred Moore, B. B. Adams, P. P. Breaden, W. C. Kendall; at Savannah, by James Irwin, L. H. Broyles, David Robinson, E. H. Shelton and A. M. Hardin; at Palmyra (Gibb's Landing), by Lewis H. Wells, A. H. Kendall and Isham P. Gibbs.

SEC. 3. The said Commissioners, or a majority of them, at each of the places aforesaid, shall receive subscription for stock in the said railroad company during the time the said books are directed to be kept open, and on each share so subscribed, shall demand and receive the sum of fifty cents.

SEC. 4. As soon as the time for receiving subscriptions, as aforesaid, shall have expired, the said Commissioners shall respectively deposit all the money so received by them in some incorporated bank, redeeming its notes in specie, to the credit of the Memphis and Charleston Railroad Company, and subject to the order of the President of the Board of Commissioners hereinafter appointed; and shall also forward a correct list of all the subscribers to said stock, with the number of shares each subscriber has taken, to a Board of Commissioners to be composed of the following persons: Leroy Pope, E. W. M. King, Austin Miller, Walter B. Morris, W. S. Wisdom, Silas Beech, William Armour and John Delafield, who may establish rules to govern their proceedings, choose their own President, and appoint such other officers and agents as they may think proper, and prescribe their duties; and who, or a majority of whom, shall meet at Memphis on the first Monday in May next, ascertain the whole number of shares taken in said company, and publish the same in some newspaper printed in Memphis on or before the third Monday in May next; and if the sum of four hundred thousand shares have been subscribed, on each of which there shall have been paid the sum of fifty cents, the Memphis and Charleston Railroad [Company] shall be regarded

as formed, and thenceforth and from the day of the closing of the books of the subscription as aforesaid, the said subscribers to the stock shall form a body politic and corporate, in deed and in law, by the name and for the purposes aforesaid; and in all things to be represented by the Board of Commissioners aforesaid, until the election of a Board of Directors as hereinafter prescribed.

SEC. 5. If, on closing the books aforesaid, the sum of four hundred thousand dollars shall not have been subscribed, then and in that case the said Board of Commissioners, by themselves or their agents, may receive subscriptions till the said sum be taken; and whenever that sum shall be subscribed, the company shall be considered as formed, as having a corporate existence as aforesaid, and of which notice shall be given as hereinbefore directed; and may proceed to survey the route for the road, and make an estimate of the cost of its construction; and the said Board of Commissioners may, by themselves or their agents, at such times and places as they may think proper, and upon such terms as to time and manner of payment as they may deem expedient, receive additional subscriptions until the said sum shall have been subscribed; upon which the company may be formed, and the subscribers shall thenceforth form a body corporate, as aforesaid; *Provided*, The same shall be done on or before the first day of January, 1849; and for the residue of the original sum the said corporation, when organized, may in like manner receive additional subscriptions.

SEC. 6. In case more than eight hundred thousand dollars shall have been subscribed on closing the books, when they are first opened, the shares shall be reduced to that number by deducting the surplus shares from the highest subscribers, placing them on equality of number, as far as can be done; and after such reduction, the holders of the remaining shares shall form the company, and be interested therein in proportion to the number of shares which they may then respectively hold.

SEC. 7. If, on closing the books on the first day of January, 1849, said sum shall not have been subscribed, the money paid by each subscriber shall be returned to him by the said Board

of Commissioners, after defraying the expenses of opening the books, and of making a survey and map of the route and estimate of the cost of the road, which the said Commissioners are hereby authorized to have made as soon as practicable.

SEC. 8. The affairs of said company shall be managed by a Board of Directors, to consist of nine, five of whom shall constitute a quorum, and who shall be chosen by the stockholders from their own body; and a President of the company shall be elected by the Directors from among their own number, in such manner as the regulations of the corporation shall prescribe.

SEC. 9. As soon as the said sum shall have been subscribed, it shall be the duty of the Commissioners appointed to declare the same, to appoint a time for the stockholders to meet in Memphis, and give notice thereof by publication in some newspaper in Memphis and Somerville, at which time the said stockholders, in person or by proxy, shall proceed to elect the Directors of the company, and to enact all such regulations, rules and by-laws as may be necessary for the government of the corporation and the transaction of its business. The persons elected Directors at this meeting shall serve for such period, not exceeding one year, as the stockholders may direct, and at this meeting the stockholders shall fix on the day and place or places when the subsequent elections of Directors shall be held, and such elections shall thenceforth be annually made; but if the day of annual elections should pass without any election of Directors, the corporation shall be thereby dissolved; but it shall be lawful on any other day to hold and make such elections in such manner as may be prescribed by a by-law of the corporation.

SEC. 10. The Board of Directors may fill all vacancies which may occur in it during the period for which their Board shall have been elected, and in the absence of the President, may fill his place by electing a President *pro tempore*.

SEC. 11. All contracts and agreements authenticated by the President of the Board shall be binding on the company, without seal, or such other mode of authentication may be used, as the company by their by-laws may adopt.

SEC. 12. The Board of Directors shall not exceed in their contracts the amount of the capital of the corporation and of the funds which the company may have borrowed and placed at the disposal of the Board; and in case they should do so, the President and Directors who may be present at the meeting at which such contract or contracts, so exceeding the amount aforesaid, shall be made, shall be jointly and severally liable for the excess, both to the contractor or contractors and the corporation; *Provided*, That any one may discharge himself from such liability by voting against such contract or contracts, and causing such vote to be recorded on the minutes of the Board, and giving notice thereof to the next general meeting of the stockholders.

SEC. 13. After the route of said railroad shall have been accurately surveyed and adopted, and a plat thereof deposited in the office of the Secretary of State, it shall not be lawful for any other railroad to be built, cut or constructed in any way or manner, or by any authority whatsoever, running laterally within twenty miles of the route so adopted, unless by said company, or with the consent of the Board of Directors thereof, for the time being.

SEC. 14. The said company shall have the exclusive right of transportation or conveyance of persons, goods, merchandise, and produce, over the said railroad by them to be constructed; *Provided*, That the charge of transportation and conveyance shall not exceed thirty-five cents per hundred pounds on heavy articles, and ten cents per cubic foot on articles of measurement, for every hundred miles, and five cents a mile for every passenger; *And provided, also*, That the said company may, when they see fit, farm out their rights of transportation on said road, subject to the rates above mentioned.

SEC. 15. The Board of Directors may call for the payment of twenty-four and a half dollars on each share of stock, in sums not exceeding two dollars, in every thirty days; *Provided*, That twenty days notice be given of such, in at least one public newspaper of the State in which any of the stockholders may reside; and a failure to pay, or secure to be paid, accord-

ing to the rules of the company, any of the installments so called, as aforesaid, shall induce a forfeiture of the share or shares on which default shall be so made, and all payments thereon; and the same shall invest in and belong to the company, and may be restored to the owner or owners by the Board of Directors, if they deem proper, on the payment of all arrears on such shares, and legal interest thereon; or the Directors may wave the forfeiture after thirty days default, and sue the stockholders for the installments due, at their discretion.

SEC. 16. The stock of said company may be transferred in such manner and form as may be directed by the by-laws of said corporation.

SEC. 17. The said company may at any time increase its capital to a sum sufficient to complete the said road, and stock it with everything necessary to give it full operation and effect, either by opening books for new stock, or by selling such new stock, or by borrowing money on the credit of the company, and on the mortgage of its charter and works; and the manner in which the same shall be done in either case shall be prescribed by the stockholders at a general meeting; and any State, or any citizen, corporation or company, of this or any other State or country, may subscribe for and hold stock in said company, with all the rights and subject to all the liabilities of any other stockholder.

SEC. 18. The Board of Directors shall once in every year, at least, make a full report on the state of the company and its affairs, to a general meeting of the stockholders, and oftener if directed by a by-law; and shall have power to call a general meeting of the stockholders when the Board may deem it expedient.

SEC. 19. No person but a citizen of the United States, and being a *bona fide* stockholder in his own right, which he shall have held at least three months previous to his election (except at the first election), shall be President or a Director of the company; nor shall any stockholder vote in person or by proxy at any general or other election (except the first), who shall not have held, in his own right, the share or shares on which he

offers to vote at least three months previous to such election.

SEC. 20. Stockholders may vote in person or by proxy; and in the election of Directors, and in voting on all questions which come before a meeting of the stockholders, or which may be submitted to the decision of the stockholders in any other manner, the owner of one or more shares shall be entitled to one vote for each and every share he, she or they may own, as aforesaid.

SEC. 21. The said company may purchase, have and hold in fee, or for a term of years, any lands, tenements or heriditaments which may be necessary for said road or appurtenances thereof, or for the erection of depositories, store-houses, houses for the officers, servants or agents of the company, or for work-shops or foundries to be used for the said company, or for procuring timber, stones, or other materials necessary for the construction of the road or its appurtenances, or for effecting transportation thereon.

SEC. 22. The said company shall have the right, when necessary, to construct the said road, or any branch thereof, across or along any public road or water-course; *Provided*, That the said road and the navigation of such water-course shall not be thereby obstructed; *And provided further*, That such railroad shall not be located so near any turnpike road as to injure or prejudice the interest of the stockholders in such turnpike road, except upon such terms as may be agreed upon by the President and Directors of the same, on behalf of the stockholders.

SEC. 23. The said company may purchase, have and hold any bridge or turnpike road over which it may be necessary to carry the said railroad; and when such purchase is made, to hold the said bridge or turnpike road on the same terms, and with all the rights which belong to the individual, individuals or corporation from which such purchase may be made; *Provided*, That the said company shall not obstruct any public road without constructing another as convenient as may be.

SEC. 24. When any lands or right of way may be required by said company for the purpose of constructing their road, and for want of agreement as to the value thereof, or from

other cause, the same cannot be purchased from the owner or owners, the same may be taken at a valuation to be made by five Commissioners, or a majority of them, to be appointed by the Circuit Court of the county where some part of the land or right of way is situated; and the said Commissioners, before they act, shall severally take an oath before some Justice of the Peace, faithfully and impartially to discharge the duty assigned them. In making the said valuation, the Commissioners shall take into consideration the loss or damage which may occur to the owner or owners in consequence of the land being taken, or the right of way surrendered; and also the benefit and advantage he, she or they may receive from the erection or establishment of the said road or works, and shall state particularly the nature and amount of each; and the excess of loss and damage over and above the benefit and advantage, shall form the measure of valuation of the said land or right of way. The proceedings of said Commissioners, accompanied with a full description of the said land or right of way, shall be returned under the hands and seals of a majority of the Commissioners to the Court from which the commission issued, there to remain of record. In case either party to the proceedings shall appeal from the valuation to the next session of the Court granting the commission, and give reasonable notice to the opposite party of such appeal, the Court shall order a new valuation to be made by a jury who shall be charged therewith, in the same term or as soon as practicable, and their verdict shall be final and conclusive between the parties, unless a new trial shall be granted; and the lands or right of way so valued by the Commissioners or jury shall vest in the said company in fee simple, so soon as the valuation may be paid, or, when refused, may be tendered. When there may be an appeal, as aforesaid, from the valuation of Commissioners by either of the parties, the same shall not prevent the works intended to be constructed from proceeding; but where the appeal is by the company, requiring the surrender, they shall be at liberty to proceed in their works only on condition of giving to the opposite party a bond, with good security, to be approved of

by the Clerk of the Court where the valuation is returned, in a penalty equal to double the said valuation, conditioned for the payment of said valuation and interest in case the same be sustained; and in case it be reversed, for the payment of the valuation thereafter to be made by the jury and confirmed by the Court; *Provided*, That when the land cannot be had by gift or purchase, the operations of the work are not to be hindered or delayed during the pendency of any proceeding to assess its value as aforesaid, nor shall any injunction or supersedeas be awarded by any Judge or Court to delay the progress of said work.

SEC. 25. In the absence of any contract with the company, in relation to the lands through which the said road may pass, signed by the owner thereof, or by his agent or any claimant or person in possession thereof, which may be confirmed by the owner, it shall be presumed that the land upon which the said road may be constructed, together with a space of one hundred feet on each side of the center of said road, has been granted to the company by the owner thereof; and the said company shall have good right and title thereto, and shall have, hold and enjoy the same as long as the same be used only for the purposes of the road, and no longer, unless the person or persons owning the said land at the time that part of the road which may be on said land was finished, or those claiming under him, her or them shall apply for an assessment for the value of the said lands as hereinbefore directed, within five years next after that part of said road was finished; and in case the said owner or owners, or those claiming under him, her or them, shall not apply for such assessment within five years next after the said part was finished, he, she or they shall be forever barred from recovering the said land or having any assessment or compensation therefor; *Provided*, Nothing herein contained shall affect the right of *femes covert* or infants until two years after the removal of their respective disabilities.

SEC. 26. If any person shall intrude upon the said railroad, or any part thereof, by any manner of use thereof, or of the rights and privileges connected therewith, without the permission, or

contrary to the will of said company, he, she or they shall forthwith forfeit to the said company all the vehicles that may be so intruded on said road, and the same may be recovered by suit at law; and the person or persons so intruding may also be indicted for misdemeanor, and, upon conviction, fined and imprisoned by any Court of competent jurisdiction.

SEC. 27. If any person shall willfully and maliciously destroy, or in any manner hurt, damage or obstruct the said railroad, or any bridge or any vehicle used for, or in the transportation therein, such person or persons so offending shall be liable to be indicted therefor, and, on conviction, shall be imprisoned not more than six nor less than one month, and pay a fine of not less than twenty dollars, and shall be further liable to pay all the expenses of repairing the same; and it shall not be competent for any person so offending against the provisions of this clause, to defend himself by pleading or giving in evidence that he was the owner or agent, or servant of the owner of the land where such destruction, hurt, damage, injury, or obstruction was done or caused, at the time the same was caused or done.

SEC. 28. Every obstruction to the safe and free passage of vehicles on the said road shall be deemed a public nuisance, and may be abated as such by an officer, agent or servant of the company; and the person causing such obstruction may be indicted and punished for erecting a public nuisance.

SEC. 29. The said company shall have the right to take at the storehouses they may establish or annex to their road, all goods, wares, merchandise and produce intended for transportation; prescribe the rules of priority, and charge and receive such just and reasonable compensation for storage as they, by rules, may establish (which they shall cause to be published), or as may be fixed by agreement with the owner; which may be distinct from the rates of transportation: *Provided*, That the said company shall not charge or receive storage on goods, wares, merchandise or produce which may be delivered to them at their regular depositories for immediate transportation, and which the company may have the power of transporting immediately.

SEC. 30. The profits of the company, or so much thereof as the Board of Directors may deem advisable, shall, when the affairs of the company will permit, be semi-annually divided among the stockholders, in proportion to the stock each may hold.

SEC. 31. The said company is hereby expressly prohibited from carrying on any banking operations; but may effect insurances on lives and property transported on the road.

SEC. 32. Whenever in the construction of said road it shall be necessary to cross or intersect any established road or way, it shall be the duty of the company to construct said road across such established road or way, so as not to impede the passage or transportation of persons or property along the same; or when it shall be necessary to pass through the land of any individual, it shall be their duty to provide for such individual a proper wagon way or ways across said road from one part of his land to the other.

SEC. 33. The said company shall possess such additional powers as may be convenient for the due and successful execution of the powers granted in this charter, and for the successful construction and management of the work.

SEC. 34. This charter shall be amendable from time to time by the Legislature, whenever the President and Directors shall unanimously petition for amendments, specifying in the petition the nature of such amendments; and when such amendments shall be adopted by the Legislature and submitted to the Directory, and be accepted and adopted unanimously by the President and Directors, they shall be obligatory on the stockholders, and not otherwise.

SEC. 35. The President, Directors, clerks, agents, officers and servants of said company shall be exempt from military duty, except in cases of invasion and insurrection; and shall also be exempt from serving on juries and working on public roads.

SEC. 36. The company shall have full power and authority to purchase and own such number of slaves as may be necessary for the construction of the said road, and for keeping the same in repair.

SEC. 37. If by decree or otherwise the said corporation shall be dissolved, the President and Directors of said company are created trustees with such powers only as may be necessary to collect the debts due the company, preserve the property, pay the debts and distribute the property and effects of the company to those who may be entitled thereto, under the charter.

SEC. 38. The capital stock of said company shall be forever exempt from taxation, and the road with all its fixtures and appurtenances, including workshops, warehouses and vehicles of transportation, shall be exempt from taxation for the period of twenty years from the completion of the road, and no longer.

SEC. 39. The railroad authorized by this Act shall be commenced within three years after the passage of this Act, and shall be finished within six years thereafter, otherwise the charter hereby granted shall be void.

SEC. 40. Any individual or individuals, company or body corporate, with the permission of the Legislature of this State, may hereafter construct branches to unite with the said Memphis and Charleston Railroad; and it shall be the duty of said company, when required, to receive on their road the full loaded freight cars from such branches, and transport the same to their destination, and to return them, without changing the loads thereof or charging for the transportation of the goods, wares, merchandise and produce therein any greater rate of freight than they charge for similar goods, wares, merchandise and produce in their own cars: *Provided*, That the company shall not be compelled to receive such cars on their road, unless they are constructed in the same manner and are of equal strength with their own cars, of which the engineer of the main road shall be the judge: *And, provided*, That the company shall not be required to receive any car from such branches without receiving payment for at least twenty miles transportation: *And provided, also*, That the said company shall be entitled in all respects to similar and equal privileges on any branches constructed to unite with their road, subject to the same restraints.

SEC. 41. *Be it enacted*, That said railroad shall commence at

or near where Union street crosses the LaGrange and Memphis railroad, in the town of Memphis, the place where the depot of said LaGrange and Memphis railroad is now situated; thence running in an easterly direction to such point on the southern boundary line of the State of Tennessee, or such point on the Tennessee river in said State as the said Memphis and Charleston Railroad Company, when organized, may determine to be the most favorable route, to form a continuous railway communication or railway and water communication from the city of Memphis to the city of Charleston. *Provided*, that the company hereby incorporated shall not locate their road on the track of the Memphis and LaGrange Railroad without first procuring the consent of the Memphis and LaGrange Railroad Company, on such terms as the companies may agree upon. *And provided*, the said Memphis and Charleston Railroad Company shall first pay or secure to be paid such sum of money for the interest of the State in the track of the Memphis and LaGrange railroad, as may be agreed upon by the Board of Internal Improvement, whereupon the said Board shall have power and are hereby authorized to convey such interest to the Memphis and Charleston Railroad Company, which transfer shall be made under the advice of the Attorney General of the State. *Provided*, that nothing herein contained shall be so construed as to fix the point at which said road shall commence or terminate at said city of Memphis. *Provided*, that nothing herein contained shall be so construed as to authorize the company herein incorporated to lay off and construct the road mentioned in this charter, until such company shall have first purchased of the State the interest which she owns in the Memphis and LaGrange Railroad Company. *And provided further*, that said commissioners, under the sanction of the Attorney General of the State, shall have power to take stock in said company to the amount of the interest of the State, or require the payment to be made in money, as they in their discretion may think will best promote the interest of the State.

BROOKINS CAMPBELL,
Speaker of the House of Representatives.
H. M. WATTERSON,
Passed February 2, 1846. *Speaker of the Senate.*

SCHEDULE 2.

An Act to incorporate the McMinnville and Chattanooga Turnpike Company.

* * * * * * * *

SEC. 19. *Be it enacted*, That the time for the completion of the said road, contemplated in the Memphis and Charleston Railroad charter, be extended to fifteen years; and the said company is hereby authorized to purchase any portion of the track of the Memphis and LaGrange Railroad Company, or the right of way on the same, upon the terms set forth in the charter of renewal by this Act.

* * * * * * *

F. BUCHANAN,
Speaker of the House of Representatives.
J. M. ANDERSON,
Speaker of the Senate.

Passed February 4, 1848.

SCHEDULE 3.

CHAPTER CXVIII.

An Act to Incorporate the Mobile and Ohio Railroad Company.

Whereas, It appears to this General Assembly, from the memorial of Jonathan Emanuel, President, and George N. Stewart, Sydney Smith, Moses Warring, Charles LeBaron and S. Griffitts Fisher, Directors of the Mobile and Ohio Railroad Association, that a company has been organized at Mobile, in the State of Alabama, for the purpose of constructing a railroad from Mobile to the Tennessee river, and from thence to a suitable point near the mouth of the Ohio river; for which purpose, said Board of President and Directors have applied to this General Assembly for the passage of such a law as may be necessary to authorize the construction of said road through the State of Tennessee. *And, whereas*, it is deemed a matter of vital importance to this State that a direct communication, by railroad, to the Gulf Mexico, be established—Therefore:

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That the said Jonathan Emanuel, President, and the said George N. Stewart, Sydney Smith, Moses Warring, Charles LeBaron and S. Griffitts Fisher, Directors, and their associates, who shall be the stockholders of said company, and their successors, under the name and style of "The Mobile and Ohio Railroad Company," are hereby declared to be a body corporate and politic under the laws of Tennessee, with succession for five hundred years, and a common seal, with capacity to have, receive and enjoy, to them and their successors, property and estate of whatsoever nature and quality, and the same to alien, transfer, dispose of, so far as may be necessary to carry

into effect the main object of this charter, which is hereby declared to be the construction, use and maintenance of a railroad from Mobile, in the State of Alabama, to some point on the Mississippi or Ohio river, near the mouth of the Ohio, passing through the State of Tennessee.

SEC. 2. *Be it enacted*, That said company is hereby declared capable of making all contracts; to sue and be sued; to make by-laws; to appoint officers, servants and agents; and finally to do all things which may be necessary to carry on the business and object for which said corporation is created. The said company is invested with all the powers necessary for the construction, repair, use and maintenance of the said railroad, with as many tracks, depots, turnouts, side-tracks, landings, warehouses, work-shops and appurtenances as they may find necessary; and is authorized to make all works whatever, which may be necessary or expedient for the proper completion, use and utility of said road; and to use the same for profit, and make dividends among the stockholders; to procure by purchase, gift or release or otherwise such lands and other property as may be necessary for the site of said railroad, or its construction and convenient use, or for the erection and use of depots, warehouses, landings, bridges or other works connected therewith; and to construct as many lateral roads, with appurtenances connected with said main stem, as they may deem proper, not extending more than fifty miles from the main road.

SEC. 3. *Be it enacted*, That said company shall be authorized and required to open books for the subscription of shares in the capital stock of said corporation, in the State of Tennessee, so as to afford to the citizens of this State an opportunity to take stock, to the amount of one-fourth of the capital of said company. *Provided*, that if said fourth be not subscribed in Tennessee within six months after the books are opened, then it may be taken elsewhere.

SEC. 4. *Be it enacted*, That the right of way is hereby granted to said corporation to pass through the State of Tennessee with said road; and to use all lands, rock, timber, earth, sand, gravel, water or other materials which may be found on the route

selected, and which may belong to the State of Tennessee, and be necessary for the use of the road; and also to appropriate and use all such land and materials, being private property, as may be necessary, making just compensation for all private property used, by contract with the parties, or by arbitration with them; and when the parties cannot agree upon the compensation to be made by the company, for the use of the road, depots, etc., then the value shall be ascertained by legal proceedings as hereinafter prescribed.

SEC. 5. *Be it enacted*, That where any lands or right of way may be required by said company for the purpose of constructing their road, and for want of agreement as to the value thereof, or from any other cause, the same cannot be purchased from the owner or owners, the same may be taken at a valuation, to be made by five Commissioners, or a majority of them, to be appointed by the Circuit Court of the county where some part of the land or right of way is situated; and the said commissioners, before they act, shall severally take an oath, before some Justice of the Peace, faithfully and impartially to discharge the duty assigned them. In making the said valuation the Commissioners shall take into consideration the loss or damage which may occur to the owner or owners, in consequence of the land being taken, or the right of way surrendered, and also the benefit and advantage he, she or they may receive from the erection or establishment of the railroad or works, and shall state particularly the nature and amount of each; and the excess of loss or damage, over and above the benefit and advantage, shall form the measure of valuation of said land or right of way. The proceedings of said Commissioners, accompanied with a full description of said land or right of way, shall be returned under the hands and seals of a majority of the commission to the Court from which the commission issued, there to remain of record. In case either party to the proceedings shall appeal from the valuation to the next session of the Court granting the commission, and give reasonable notice to the opposite party of such appeal, the Court shall order a new valuation to be made by a jury, who shall be charged

therewith in the same term, or as soon as practicable, and their verdict shall be final and conclusive between the parties, unless a new trial shall be granted; and the lands or right of way so valued by the Commissioners or jury shall vest in said company in fee simple, so soon as the valuation is paid, or tendered and refused. Where there may be an appeal, as aforesaid, from the valuation of Commissioners, by either of the parties, the same shall not prevent the works intended to be constructed from proceeding; but where the appeal is by the company, requiring the surrender, they shall be at liberty to proceed in their works, only on condition of giving the opposite party a bond, with good security, to be approved by the Clerk of the Court where the valuation is returned, in a penalty equal to double the said valuation, conditioned for the payment of said valuation and interest, in case the same be sustained, and in case it be reversed, for the payment of the valuation thereafter to be made by the jury, and confirmed by the Court. *Provided*, that when the land cannot be had by gift or purchase, the construction of the work shall not be hindered or delayed during the pendency of any proceeding to assess its value as aforesaid; nor shall any injunction or *supersedeas* be awarded by any Judge or Court to delay the progress of said work.

SEC. 6. *Be it enacted*, That in the absence of any contract with the said company in relation to lands through which the said road may pass, signed by the owner thereof, or by his agent, or any claimant or person in possession thereof, which may be confirmed by the owner, it shall be presumed that the land upon which said road may be constructed, together with a space of one hundred feet on each side of the center of said road, has been granted to the company by the owner thereof, and said company shall have good right and title thereto, and shall have, hold and enjoy the same as long as the same be used only for the purposes of the road and no longer, unless the person or persons owning said land at the time that part of the road, which may be on said land, was finished, or those claiming under him, her or them, shall apply for an assessment of the value of the said lands, as hereinbefore directed, within five

years next after that part of said road was finished; and in case the said owner or owners, or those claiming under him, her or them, shall not apply for such assessment within five years next after the said part was finished, he, she or they shall be forever barred from recovering of the said land, or having any assessment or compensation therefor. *Provided*, nothing herein contained shall affect the right of *femes covert* or infants, until two years after the removal of their respective disabilities.

SEC. 7. *Be it enacted*, That if any person shall willfully or maliciously destroy, or in any manner hurt, damage or obstruct the said railroad, or any bridge or any vehicle, used for or in the transportation thereon, such person or persons so offending shall be liable to be indicted therefor, and on conviction shall be imprisoned not more than six nor less than one month, and pay a fine not less than twenty dollars, and shall be further liable to pay all the expenses of repairing the same. And it shall not be competent for any person so offending against the provisions of this section to defend himself by pleading that he was the owner, or agent or servant of the owner, of the land where such destruction, hurt, damage, injury or obstruction was done or caused at the time the same was caused or done.

SEC. 8. *Be it enacted*, That every obstruction to the safe and free passage of vehicles on the said road shall be deemed a public nuisance, and may be abated as such by any officer, agent or servant of the company, and the person causing such obstruction may be indicted and punished for erecting a public nuisance.

SEC. 9. *Be it enacted*, That the said company is hereby expressly prohibited from carrying on any banking operations; but may effect insurance on lives and property transported on said road.

SEC. 10. *Be it enacted*, That the President and Directors, clerks, agents and officers of said company shall be exempt from military duty, except in cases of invasion or insurrection, and serving on juries; and the servants of said company shall be exempt from working on public roads.

SEC. 11. *Be it enacted*, That the capital stock of said company shall be forever exempt from taxation, and the road, with all its fixtures and appurtenances, including work-shops, warehouses and vehicles of transportation, shall be exempt from taxation for the period of twenty-five years from the completion of the road, and no tax shall ever be laid on said road or its fixtures which will reduce the dividends below eight per cent.

SEC. 12. *Be it enacted*, That the railroad authorized by this Act shall be commenced within four years after the passage of this Act, and shall be finished within ten years thereafter, otherwise the charter hereby granted shall be void.

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F. BUCHANAN,
Speaker of the House of Representatives.
J. M. ANDERSON,
Speaker of the Senate.

Passed January 28, 1848.

SCHEDULE 4.

CHAPTER LXXV.

An Act to Charter the Tennessee and Alabama Railroad Company, and for other purposes.

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SEC. 4. *Be it enacted*, That the 12th section of the Act entitled "An Act to incorporate the Mobile and Ohio Railroad Company and the Tennessee Central Railroad Company," passed January 28th, 1848, chap. 118, be, and the same is hereby amended, so as to allow said Mobile and Ohio Railroad Company to commence said railroad within five years after the passage of said Act, instead of four years, as required by the said 12th section of said Act of 1848.

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JORDAN STOKES,
Speaker of the House of Representatives.
M. R. HILL,
Speaker of the Senate.

Passed January 23, 1852.

SCHEDULE 5.

CHAPTER CCXLIV.

An Act to charter the Lexington and Knoxville Railroad Company, and for other purposes.

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SEC. 57. *Be it enacted*, That J. G. M. Ramsey, Jos. L. King, John H. Crozier, James Williams, Jas. H. Cowan, Campbell Wallace, Thomas C. Lyon, and Charles H. Coffin, of the county of Knox, with such other persons or corporations as shall associate with them, are hereby constituted a body politic and corporate, by the name and style of the Knoxville and Charleston Railroad Company, and by that name may sue and be sued, contract and be contracted with, and may exercise all the powers and privileges necessary for the construction and use of a railroad, either by double or single track, from the city of Knoxville, in the direction of Charleston, South Carolina, so as to form a continuous railroad connection between said cities.

SEC. 58. That said company is hereby invested, for the purpose of making and using said road, with all the powers, rights and privileges, and subject to all the liabilities and restrictions that have been conferred and imposed on the Nashville and Chattanooga Railroad Company in its original charter.

SEC. 59. That it shall and may be lawful for the said company to negotiate with any other railroad company, chartered by the States of North Carolina or South Carolina, or either of them, who may desire to extend their road over any portion of the route herein designated, and to transfer to said last mentioned company or companies, all the powers, rights and priv-

ileges herein conferred on them, either in whole or in part, and thereupon such company or companies shall have the same powers, rights, privileges and immunities in making said road, on the route aforesaid, as are herein conferred on the company hereby incorporated, and be subject to the same limitations and restrictions.

SEC. 60. That the capital stock of the said Knoxville and Charleston Railroad Company shall be five hundred thousand dollars, which may be increased, if necessary, to one million of dollars.

SEC. 61. That the above named Commissioners, or any two of them, may open books of subscription for stock in said company, at such times and places as they may choose, and whenever one hundred thousand dollars has been subscribed, the said company may be considered as formed, and proceed to organize according to the provisions of this charter.

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JORDAN STOKES,
Speaker of the House of Representatives.

M. R. HILL,
Speaker of the Senate.

Passed February 18, 1852.

SCHEDULE 6.

CHAPTER I.

An Act to Incorporate the Nashville and Chattanooga Railroad Company.

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee,* That for the purpose of establishing a communication, by railroad, between Nashville and Chattanooga, the formation of a company is hereby authorized, which, when formed, shall be a body corporate by the name and style of "The Nashville and Chattanooga Railroad Company," and by said corporate name shall be capable in law to buy, receive by gift, hold, sell and convey real and personal estate, as hereinafter provided, make contracts, sue and be sued, to make by-laws, and to do all lawful acts properly incident to a corporation, and necessary and proper to the transaction of the business for which it is incorporated, and to have and use a common seal, and the same to alter and destroy at its pleasure, and shall have perpetual succession of members.

SEC. 2. Books for subscription of sixty thousand shares of the capital stock of said company, of twenty-five dollars each, shall be opened on the first Monday in January, 1846, and shall be kept open for six days, between the hours of ten o'clock in the morning and four o'clock in the evening of each of those days, at the following places, and by the following Commissioners, to-wit:

At Nashville, by James Overton, John M. Hill, George W. Martin, Thomas Washington, John Shelby, Godfrey M. Fogg, John W. Walker, Jacob McGavock, J. Hugh Smith, W. W. Woodfolk, A. W. Vanleer, Samuel Watkins, Thomas Wells,

John Thompson, Joseph B. Knowles, James Erwin, Felix R. Raines, Pleasant Smith, J. J. Gill, John Nichol, West H. Humphreys, R. J. Meigs, A. V. S. Lindsley, Alexander Allison and Robert I. Moore.

At Gallatin, by James A. Blackmore, Elijah Boddie, Henry B. Vaughn, Daniel S. Donaldson, S. R. Anderson and William M. Blakemore.

At Shelbyville, by Robert Matthews, George Davidson, Thomas Dean, John Eakin and W. C. Swanson.

At Gainesboro', by Thomas L. Bransford, Watson M. Cooke, Samuel E. Hare and Richard P. Brooks.

At Lebanon, by Paulding Anderson, R. L. Caruthers and Calvin Jackson.

At McMinnville, by George R. Smart, William Black, Jesse Locke, Philip Hoodenpyl and L. D. Mercer.

At Franklin, by Thomas Parks, William Park, Nicholas Perkins, Samuel Crockett and Robert C. Foster.

At Murfreesboro, by Charles Ready, Edwin A. Keeble, Marman Spence, Lewis Garner and L. H. Carney.

At Sparta, by James Snodgrass, John Warren and William M. Young.

At Fayetteville, by John Clark, jr., John M. Bright, Robert Farquharson, William T. Ross, James Fulton and William Bonner.

At Pulaski, by Andrew M. Ballentine, Thomas Martin and Benjamin Carter.

At Winchester, by Benjamin Deckard, Mark Hutchins, James Harris, James Sharp, Thomas Wilson and C. C. Garner.

At Chattanooga, by Robert M. Hooke, Benjamin Chandler and John P. Long.

At Jasper, by Jackson Pryor, Daniel R. Rawlings and John Herriford.

At Lewisburg, by Benjamin Williams, Ephraim Hunter, James V. Ewing, Morgan Fitzpatrick and Henry Hardin.

SEC. 3. The said Commissioners, or a majority of them, at each of the places aforesaid, shall receive subscription for stock in the said railroad company during the time the said books

are directed to be kept open, and on each share so subscribed shall demand and receive the sum of fifty cents, without which the subscription shall be void.

SEC. 4. As soon as the time for receiving subscriptions as aforesaid shall have expired, the said Commissioners shall respectively deposit all the money so received by them in some incorporated bank redeeming its notes in specie, to the credit of the Nashville and Chattanooga Railroad Company, and subject to the order of the President of the Board of Commissioners hereinafter appointed, and shall also forward a correct list of all the subscribers to the said stock, with the number of shares each subscriber has taken, to a Board of Commissioners to be composed of the following persons: John M. Bass, John M. Hill, Francis B. Fogg, Andrew Ewing, A. O. P. Nicholson, V. K. Stevenson, John Bell, Willoughby Williams, William Nichol, S. D. Morgan, Joseph T. Elliston, Joseph W. Horton, James A. Porter, James Overton and John Shelby—who may establish rules to govern their proceedings, choose their own President, and appoint such other officers and agents as they may think proper, and prescribe their duties, and who, or a majority of whom, shall meet at Nashville on the third Monday in January next—ascertain the whole number of shares taken in the said company, and publish the same in some newspaper printed in Nashville on or before the fourth Monday in January next; and if the number of four thousand shares shall have been subscribed, on each of which there shall have been paid the sum of fifty cents, the Nashville and Chattanooga Railroad Company shall be regarded as formed, and thenceforth and from the day of the closing of the books of the subscription as aforesaid, the said subscribers to the stock shall form a body politic and corporate, in deed and in law, by the name and for the purposes aforesaid; and in all things to be represented by the Board of Commissioners aforesaid, until the election of a Board of Directors as hereinafter prescribed.

SEC. 5. If, on closing the books aforesaid, the number of four thousand shares shall not have been subscribed, then and

in that case the said Board of Commissioners, by themselves or their agents, may receive subscriptions till the number of four thousand shares be taken; and whenever that number of shares shall be subscribed, the company shall be considered as formed, as having a corporate existence as aforesaid, and of which notice shall be given as hereinbefore directed; and may proceed to survey the route for the road, and make an estimate of the cost of its construction. Nevertheless, no conclusive and binding location on the road shall be made by the Board of Commissioners, but the same be left to the determination of the first Board of Directors chosen by the stockholders. And the said Board of Commissioners may, by themselves or their agents, at such times and places as they may think proper, and upon such terms as to time and manner of payment as they may deem expedient, receive additional subscriptions until the number of forty thousand shares shall have been subscribed; upon which the company may be formed, and the subscribers shall thenceforth form a body corporate, as aforesaid; *Provided*, The same shall be done on or before the first day of January, 1848; and for the residue of the original number of sixty thousand shares the said corporation, when organized, may in like manner receive additional subscriptions.

SEC. 6. In case more than sixty thousand shares shall have been subscribed on closing the books when they are first opened, the shares shall be reduced to that number by deducting the surplus shares from the highest subscribers, placing them on equality of numbers as far as can be done; and after such reduction, the holders of the remaining shares shall form the company, and be interested therein in proportion to the number of shares which they may then respectively hold.

SEC. 7. If, on closing the books on the first day of January, eighteen hundred and forty-eight, the number of forty thousand shares shall not have been subscribed, the money paid by each subscriber shall be returned to him by the said Board of Commissioners, after defraying the expenses of opening the books, and of making a survey and map of the route and estimate of the cost of the road, which the said Commissioners are hereby authorized to have made as soon as practicable.

SEC. 8. The affairs of said company shall be managed by a Board of Directors, to consist of fifteen, who shall be chosen by the stockholders from their own body, and a President of the company shall be elected by the Directors from among their own members, in such manner as the regulations of the corporation shall prescribe.

SEC. 9. As soon as the number of forty thousand shares shall have been subscribed, it shall be the duty of the Commissioners appointed to declare the same, to appoint a time for the stockholders to meet in Nashville, and give notice thereof by publication in some of the newspapers of Nashville, at which time and place the said stockholders, in person or by proxy, shall proceed to elect the Directors of the company, and to enact all such regulations, rules and by-laws as may be necessary for the government of the corporation, and the transaction of its business. The persons elected Directors at this meeting shall serve for such period, not exceeding one year, as the stockholders may direct; and at this meeting the stockholders shall fix on the day and place or places where the subsequent elections of Directors shall be held; and such elections shall thenceforth be annually made. But if the day of annual election should pass without any election of Directors, the corporation shall not be thereby dissolved, but it shall be lawful on any other day to hold and make such elections in such manner as may be prescribed by a by-law of the corporation.

SEC. 10. The Board of Directors may fill up all vacancies which may occur in it during the period for which their Board shall have been elected; and in the absence of the President may fill his place by electing a President *pro tempore*.

SEC. 11. All contracts and agreements authenticated by the President of the Board shall be binding on the company, without seal, or such other mode of authentication may be used as the company by their by-laws may adopt.

SEC. 12. The Board of Directors shall not exceed, in their contracts, the amount of the capital of the incorporation, and of the funds which the company may have borrowed and placed at the disposal of the Board; and in case they should do so,

the President and Directors who may be present at the meeting at which such contract or contracts so exceeding the amount aforesaid shall be made, shall be jointly and severally liable for the excess, both to the contractor or contractors and the corporation. *Provided*, that any one may discharge himself from such liability by voting against such contract or contracts, and causing such vote to be recorded on the minutes of the Board, and giving notice thereof to the next general meeting of the stockholders.

SEC. 13. After the route of such railroad shall have been accurately surveyed and adopted, and a plat thereof deposited in the office of the Secretary of State, it shall not be lawful for any other railroad to be built, cut or constructed, in any way or manner, or by any authority whatsoever, running laterally within twenty miles of the route so adopted, unless by said company, or with the consent of the Board of Directors thereof for the time being.

SEC. 14. The said company shall have the exclusive right of transportation or conveyance of persons, goods, merchandise and produce over the said railroad by them to be constructed: *Provided*, That the charge of transportation or conveyance shall not exceed thirty-five cents per hundred pounds on heavy articles, and ten cents per cubic foot on articles of measurement for every hundred miles, and five cents a mile for every passenger; *And provided, also*, That the said company may, when they see fit, farm out their rights of transportation on said road, subject to the rates above mentioned.

SEC. 15. The Board of Directors may call for the payment of twenty-four and a half dollars on each share of stock in sums not exceeding two dollars in every thirty days: *Provided*, That twenty days' notice be given of such call in at least one public newspaper of the State in which any of the stockholders may reside; and a failure to pay or secure to be paid, according to the rules of the company, any of the installments so-called, as aforesaid, shall induce a forfeiture of the share or shares on which default shall be so made, and all payments thereon, and the same vest in and belong to the company, and may be re-

stored to the owner or owners by the Board of Directors, if they deem proper, on the payment of all arrears on such shares, and legal interest thereon; or the Directors may waive the forfeiture after thirty days' default, and sue the stockholders for the installments due, at their discretion.

SEC. 16. The stock of said company may be transferred in such manner and form as may be directed by the by-laws of the said corporation.

SEC. 17. The said company may at any time increase its capital to a sum sufficient to complete the said road, and stock it with everything necessary to give it full operation and effect, either by opening books for new stock, or by selling such new stock, or by borrowing money on the credit of the company, and on the mortgage of its charter and works; and the manner in which the same shall be done in either case shall be prescribed by the stockholders at a general meeting; and any State, or any citizen, corporation or company, of this or any other State or country, may subscribe for and hold stock in said company, with all the rights and subject to all the liabilities of any other stockholder.

SEC. 18. The Board of Directors shall once in every year, at least, make a full report on the state of the company and its affairs, to a general meeting of the stockholders, and oftener if directed by a by-law; and shall have power to call a general meeting of the stockholders when the Board may deem it expedient.

SEC. 19. No person but a citizen of the United States, and being a *bona fide* stockholder in his own right of at least forty shares, which he shall have held at least three months previous to his election (except at the first election), shall be President or a Director of the company; nor shall any stockholder vote in person or by proxy at any general or other election (except the first), who shall not have held, in his own right, the shares on which he offers to vote, at least three months previous to such election.

SEC. 20. Stockholders may vote in person or by proxy; and in the election of Directors, and in voting on all questions

which come before a meeting of the stockholders, or which may be submitted to the decision of the stockholders in any other manner, the vote shall be taken according to the following scale: the owner of one or two shares shall be entitled to one vote; the owner of not less than three nor more than four shares shall be entitled to two votes; the owner of not less than five nor more than six shares shall be entitled to three votes; the owner of not less than seven nor more than eight shares to four votes; the owner of not less than nine nor more than eleven shares to five votes; the owner of not less than twelve nor more than fifteen shares to six votes; the owner of not less than sixteen nor more than twenty shares to seven votes; the owner of not less than twenty-one nor more than twenty-six shares to eight votes; the owner of not less than twenty-seven shares nor more than thirty-three to nine votes; the owner of not less than thirty-four nor more than forty shares to ten votes, and the owner of every ten shares above forty shall be entitled therefor to one vote. *Provided*, that no individual, corporation or company shall be entitled to more than five hundred votes.

SEC. 21. The said company may purchase, have and hold, in fee, or for a term of years, any lands, tenements or hereditaments which may be necessary for said road, or appurtenances thereof, or for the erection of depositories, storehouses, houses for the officers, servants or agents of the company, or for workshops or foundries to be used for the said company, or for procuring timber, stones or other materials necessary for the construction of the road or its appurtenances, or for effecting transportation thereon.

SEC. 22. The said company shall have the right, when necessary, to construct the said road, or any branch thereof, across or along any public road or water-course; *Provided*, That the said road, and the navigation of the said water-course, shall not be thereby obstructed; and *provided, further*, that such railroad shall not be located so near any turnpike road as to injure or prejudice the interests of the stockholders in such turnpike road, except upon such terms as may be agreed upon by the

President and Directors of the same, on behalf of the stockholders.

SEC. 23. The said company may purchase, have and hold any bridge or turnpike road over which it may be necessary to carry the said railroad; and, when such purchase is made, to hold the said bridge or turnpike road on the same terms, and with all rights which belong to the individual, individuals or corporation from which such purchase may be made; *Provided*, That the said company shall not obstruct any public road without constructing another as convenient as may be.

SEC. 24. Where any lands or right of way may be required by the said company for the purpose of constructing their road, and for want of agreement as to the value thereof, or from other cause, the same cannot be purchased from the owner or owners, the same may be taken at a valuation to be made by five Commissioners, or a majority of them, to be appointed by the Circuit Court of the county where some part of the land or right of way is situated; and the said Commissioners, before they act, shall severally take an oath before some Justice of the Peace, faithfully and impartially to discharge the duty assigned them. In making the said valuation, the Commissioners shall take into consideration the loss or damage which may occur to the owner or owners in consequence of the land being taken, or the right of way surrendered; and also the benefit and advantage he, she or they may receive from the erection or establishment of the railroad or works, and shall state particularly the nature and amount of each; and the excess of loss and damage over and above the benefit and advantage, shall form the measure of valuation of the said land or right of way. The proceedings of said Commissioners, accompanied with a full description of the said land or right of way, shall be returned under the hands and seals of a majority of the Commissioners to the Court from which the commission issued, there to remain of record. In case either party to the proceedings shall appeal from the valuation to the next session of the Court granting the commission, and give reasonable notice to the opposite party of such appeal, the Court shall order a

new valuation to be made by a jury who shall be charged therewith, in the same term or as soon as practicable, and their verdict shall be final and conclusive between the parties, unless a new trial shall be granted; and the lands or right of way so valued by the Commissioners or jury shall vest in the said company in fee simple, so soon as the valuation may be paid, or, when refused, may be tendered. When there may be an appeal, as aforesaid, from the valuation of Commissioners by either of the parties, the same shall not prevent the works intended to be constructed from proceeding; but where the appeal is by the company, requiring the surrender, they shall be at liberty to proceed in their works only on condition of giving to the opposite party a bond, with good security, to be approved of by the Clerk of the Court where the valuation is returned, in a penalty equal to double the said valuation, conditioned for the payment of said valuation and interest in case the same be sustained; and in case it be reversed, for the payment of the valuation thereafter to be made by the jury and confirmed by the Court; *Provided*, That when the land cannot be had by gift or purchase, the operations of the work are not to be hindered or delayed during the pendency of any proceeding to assess its value as aforesaid, nor shall any injunction or supersedeas be awarded by any Judge or Court to delay the progress of said work.

SEC. 25. In the absence of any contract with the said company, in relation to lands through which the said road may pass, signed by the owner thereof, or by his agent or any claimant or person in possession thereof, which may be confirmed by the owner, it shall be presumed that the land upon which the said road may be constructed, together with a space of one hundred feet on each side of the center of said road, has been granted to the company by the owner thereof; and the said company shall have good right and title thereto, and shall have, hold and enjoy the same as long as the same be used only for the purposes of the road, and no longer, unless the person or persons owning the said land at the time that part of the road which may be on said land was finished, or those claiming under

him, her or them shall apply for an assessment for the value of the said lands as hereinbefore directed, within five years next after that part of said road was finished; and in case the said owner or owners, or those claiming under him, her or them, shall not apply for such assessment within five years next after the said part was finished, he, she or they shall be forever barred from recovering the said land or having any assessment or compensation therefor; *Provided*, Nothing herein contained shall affect the right of *femes covert* or infants until two years after the removal of their respective disabilities.

SEC. 26. If any person shall intrude upon the said railroad, or any part thereof, by any manner of use thereof, or of the rights and privileges connected therewith, without the permission, or contrary to the will of said company, he, she or they shall forthwith forfeit to the said company all the vehicles that may be so intruded on said road, and the same may be recovered by suit at law; and the person or persons so intruding may also be indicted for misdemeanor, and, upon conviction, fined and imprisoned by any Court of competent jurisdiction.

SEC. 27. If any person shall willfully and maliciously destroy or in any manner hurt, damage or obstruct the said railroad, or any bridge, or any vehicle used for, or in the transportation thereon, such person or persons so offending shall be liable to be indicted therefor, and, on conviction, shall be imprisoned not more than six nor less than one month, and pay a fine not less than twenty dollars; and shall be further liable to pay all the expenses of repairing the same; and it shall not be competent for any person so offending against the provisions of this clause, to defend himself by pleading or giving in evidence that he was the owner or agent, or servant of the owner of the land where such destruction, hurt, damage, injury, or obstruction was done or caused, at the time the same was caused or done.

SEC. 28. Every obstruction to the safe and free passage of vehicles on the said road shall be deemed a public nuisance, and may be abated as such by an officer, agent or servant of the company; and the person causing such obstruction may be indicted and punished for erecting a public nuisance.

SEC. 29. The said company shall have the right to take at the storehouses they may establish or annex to their railroad, all goods, wares, merchandise and produce intended for transportation; prescribe the rules of priority, and charge and receive such just and reasonable compensation for storage as they, by rules, may establish (which they shall cause to be published), or as may be fixed by agreement with the owner; which may be distinct from the rates of transportation: *Provided*, That the said company shall not charge or receive storage on goods, wares, merchandise or produce which may be delivered to them at their regular depositories for immediate transportation, and which the company may have the power of transporting immediately.

SEC. 30. The profits of the company, or so much thereof as the Board of Directors may deem advisable, shall, when the affairs of the company will permit, be semi-annually divided among the stockholders in proportion to the stock each may hold.

SEC. 31. The said company is hereby expressly prohibited from carrying on any banking operations, but may effect insurance on lives and property transported on the road.

SEC. 32. Whenever, in the construction of said road, it shall be necessary to cross or intersect any established road or way, it shall be the duty of the company to construct said road across such established road or way so as not to impede the passage or transportation of persons or property along the same; or where it shall be necessary to pass through the land of any individual, it shall be their duty to provide for such individual a proper wagon-way or ways across said road from one part of his land to the other.

SEC. 33. The said company shall possess such additional powers as may be convenient for the due and successful execution of the powers granted in this charter, and for the successful construction and management of the work.

SEC. 34. This charter shall be amendable from time to time by the Legislature, whenever the President and Directors shall unanimously petition for amendments, specifying in the petition

the nature of such amendments; and when such amendments shall be adopted by the Legislature and submitted to the Directory, and be accepted and adopted unanimously by the President and Directors, they shall be obligatory on the stockholders, and not otherwise.

SEC. 35. The President, Directors, clerks, agents, officers and servants of said company shall be exempt from military duty, except in cases of invasion and insurrection; and shall also be exempt from serving on juries and working on public roads.

SEC. 36. The company shall have full power and authority to purchase and own such number of slaves as may be necessary for the construction of the said road, and for keeping the same in repair.

SEC. 37. If by decree or otherwise the said corporation shall be dissolved, the President and Directors of said company are created trustees with such powers only as may be necessary to collect the debts due the company, preserve the property, pay the debts and distribute the property and effects of the company to those who may be entitled thereto, under the charter.

SEC. 38. The capital stock of said company shall be forever exempt from taxation, and the road with all its fixtures and appurtenances, including workshops, warehouses and vehicles of transportation, shall be exempt from taxation for the period of twenty years from the completion of the road, and no longer.

SEC. 39. The railroad authorized by this Act shall be commenced within three years after the passage of this Act, and shall be finished within six years thereafter, otherwise the charter hereby granted shall be void.

SEC. 40. Any individual or individuals, company or body corporate, with permission of the Legislature of this State, may hereafter construct branches to unite with the said Nashville and Chattanooga Railroad; and it shall be the duty of said company, when required, to receive on their road the full loaded freight cars from such branches, and transport the same to their destination, and to return them, without changing the loads thereof or charging for the transportation of the goods, wares,

merchandise and produce therein any greater rate of freight than they charge for similar goods, wares, merchandise and produce in their own cars: *Provided*, That the company shall not be compelled to receive such cars on their road, unless they are constructed in the same manner and are of equal strength with their own cars, of which the engineer of the main road shall be the judge: *And, provided*, That the company shall not be required to receive any car from such branches without receiving payment for at least twenty miles transportation: *And provided, also*, That the said company shall be entitled in all respects to similar and equal privileges on any branches constructed to unite with their road, subject to the same restraints.

BROOKINS CAMPBELL,
Speaker of the House of Representatives.

H. M. WATTERSON,
Speaker of the Senate.

Passed December 11, 1845.

SCHEDULE 7.

CHAPTER LXXVIII.

An Act declaring the Mode and Manner of Valuing the Property of a Railroad Company for Taxation.

WHEREAS, It is provided, in Section 28 of Article 2 of the Constitution of this State, "That all property shall be taxed," and further, that "All property shall be taxed according to its value, that value to be ascertained in such manner as the Legislature shall direct, so that taxes shall be equal and uniform throughout the State;" and,

WHEREAS, The four elements of property in all joint stock companies are: 1st, the capital stock; 2d, the corporate property; 3d, the franchises of the corporation; and, 4th, the individual stock of the shareholders; therefore,

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That each railroad company owning and operating a railroad in the State shall, on or before the first day of May of each year, make out and file with the Comptroller of the Treasury, a complete schedule of all its property, real, personal, or mixed, setting forth therein the length in miles, or fraction thereof, of its entire road-bed, switches and side-tracks, and showing how many miles or fractions thereof lie in the State, in each county of the State through which the road passes, and in each incorporated towo, and the value of the whole and each part thereof, as sub-divided herein; the total amount of capital stock; the number of engines and their respective values, the gross annual receipts, the number of cars of all character, their classes and value; the number of depot buildings and

warehouses, and other buildings, in what county and incorporated town located, and the value of each, including the lands and lots upon which the same are built; the value of all machine shops, and stationary machinery and tools therein, and in what county and incorporated town located, including the land upon which the same are built; all real, personal or mixed property belonging to the company, within the State, not enumerated above, with its value.

SEC. 2. *Be it further enacted*, That it shall be the duty of each railroad company to furnish and file the schedule above mentioned with the Comptroller, as provided herein, at the time and in the manner specified; and when any company has filed the same, or neglected and refused so to do, the Comptroller shall notify the Governor of the fact, and thereupon the Governor shall appoint three freeholders, being citizens of the State, one of whom shall be resident in each grand division of the State, and neither of whom shall be interested in or connected in any way with management of any railroad, and shall commission them as Railroad Tax Assessors for the State at large; and these Assessors shall, before entering upon their duties, respectively take and subscribe an oath before a Judge (who shall certify the same to the Governor), honestly, faithfully, and without fear, favor, or partiality, to discharge all the duties imposed upon him as such Assessor.

SEC. 3. *Be it further enacted*, That the Railroad Tax Assessors provided for herein shall be appointed and commissioned by the Governor within ten days after said first day of May, and said Assessors shall meet in the city of Nashville on the first day of June thereafter, and the Comptroller shall pass to them the schedules filed in his office, and certify to them what railroads, if any, have failed or refused to file the same; and said Assessors shall proceed at once to ascertain, test and value the property belonging to said railroad company. In making such valuation they shall have in view and look to the capital stock, the corporate property, the franchises of each company, as well as the gross receipts, and the individual stock of each shareholder; and to ascertain these facts, they shall

have the power to summon before them any person, and to call for the books of any railroad company, and administer oaths, and examine any person so summoned touching any matter necessary to enable them to discharge their duties, and may direct their writs of summons to any Sheriff in the State, to be executed in his county; and any person so called on to testify shall be guilty of perjury if he shall falsely testify. Having ascertained, in the manner indicated herein, the character and total value of all the property, wherever situated, of any railroad company, and after having deducted from the aggregate value one thousand dollars, as well as the real cash value of the individual shares, they shall divide the same by the number of miles in the entire length of the road, and the result shall be the value per mile of the property of such company for the purpose of taxation; and the value per mile of any such railroad, as ascertained above, shall be multiplied by the number of miles in the State, and the product thereof shall be the sum to be taxed to such railroad company for State purposes; and the value per mile, as ascertained, shall be multiplied by the number of miles or fractions thereof lying and being in any county, and the product shall be the sum to be taxed for county purposes; and having ascertained the said several sums to be taxed, they shall certify the same to the Comptroller, together with the facts.

SEC. 4. *Be it further enacted*, That if any railroad company fail or refuse to file the schedule herein required, or having filed the same, the Assessors regard the same as not fair and just, said Assessors are hereby empowered and authorized to ascertain the items and value of any property, in such manner as they may deem best, and shall add ten per cent. to the taxes of said company so failing to file any schedule, or filing one not fair and just.

SEC. 5. *Be it further enacted*, That any two of said Assessors shall be and constitute a lawful Board of Assessors, and may do and perform all the duties enjoined upon them under this Act; and they may, jointly or singly, examine the property of any railroad company, and each shall be allowed his actual travel-

ing expenses and a per diem of five dollars, while employed in the performance of the duties enjoined upon them by this Act, to be paid upon the warrant of the Comptroller, issued to each upon his stated account, out of any money in the Treasury.

SEC. 6. *Be it further enacted*, That when said Assessors shall have complied with the provisions of this Act, and certified to the Comptroller the amount to be taxed to each railroad company, together with all the facts, it shall be the duty of the Comptroller to submit the same forthwith to the Governor, Secretary of State, and the Treasurer, these being hereby constituted a Board of Examiners; and if, in the opinions of these three, or any two of them, the valuation so made and reported of any railroad company is too low, or is not just and fair, it shall be the duty of the Governor to appoint another Board of Assessors, and said last Board shall proceed at once to value the property, under the provisions of this Act, and to this end are empowered to do all the acts and things permitted herein to the first Board, and may adopt any facts found by the first Board; and the last Board shall certify the result, as soon as possible, to the Comptroller, and the same shall be final; *Provided*, That upon the happening of the contingencies of a "too low," unjust, or unfair valuation of said property by the first appointed Assessors, or three successors so appointed by the Governor in pursuance of this Act, no per diem shall be allowed for the services so allowed.

SEC. 7. *Be it further enacted*, That when the valuation of the property of any railroad company shall be ascertained and certified to the Comptroller, according to the provisions of this Act, it shall be the duty of the Comptroller to ascertain the amount of taxes due the State from each, and notify the company of the same, by letter or otherwise; and he shall certify to the County Court Clerk of each county in which a railroad line lies, the amount to be taxed in said counties respectively for county purposes; and likewise to the Mayor of any incorporated town, the amount to be taxed by said town; and the County Court Clerk shall enter the same upon the Collector's book, specifying the amount of taxes to be collected as now provided by law.

SEC. 8. *Be it further enacted*, That the taxes so assessed in behalf of the State shall be due as other taxes, and if the same be not paid to the Comptroller within the time allowed other taxpayers, he shall proceed to collect the same in the manner following: He shall issue a distress warrant against the company for the amount thereof, and the same may be issued to any Sheriff in the State, whose duty it shall be to levy the same upon any personal property of the company to be found in his county, and sell the same as other property of like character is sold for taxes; and, in the collection of said tax, the Comptroller is hereby empowered to do all acts and things which any collector of revenue is authorized to do by law; and should he fail to realize the taxes and costs from the sale of personal property or otherwise, he is hereby authorized and empowered to expose to public sale, to the highest bidder, all the property of such defaulting railroad company lying and being in this State, together with its franchises, after giving thirty days' notice of the time and place of sale, in some newspaper published in the city of Nashville, and to make a deed of conveyance thereof to the purchaser; and it shall be the duty of the Governor to issue his warrants to any of the Sheriffs along the line of said railroad, authorizing and commanding the Sheriffs to put such purchaser into the full and complete possession of such road, and all its property, and the Sheriff shall execute the same at once.

SEC. 9. *Be it further enacted*, That the collector of taxes for any county shall collect the amount due to the county as is now provided by law in case of delinquents.

SEC. 10. *Be it further enacted*, That the property of any railroad company lying or being in any city or incorporated town, may be taxed for city purposes upon a valuation thereof made upon the same basis as of the property belonging to a citizen taxpayer.

SEC. 11. *Be it further enacted*, That each and every railroad company which will accept as a special amendment to its charter, for a period of ten years from the first day of January, 1875, and that will pay annually to the Treasurer of the State one

and one-half per cent. on the gross receipts, from all sources, of such company, shall be exempt from the provisions of the foregoing sections of this Act, and the payment of said one and one-half per cent. upon all gross earnings of such road, shall be in full of all taxation. The return of such gross receipts by said company, to be made under oath by the President, Superintendent and Treasurer, to the Treasurer of the State, on the 10th day of January of each and every year, for the calendar year preceding, the first return and payment to be made on the 10th day of January, 1876, for the preceding year, and so for each succeeding year. If any railroad company, accepting the provisions of this section, fails to make the return and pay in the tax in this section provided for, by the 15th day of January of each year, it shall be the duty of the Governor, Comptroller and Treasurer to demand the books, or papers, or both, of such company, necessary to make up such estimate, and when so made up by them shall be the amount of gross earnings for which such road shall be liable to pay on; and the Treasurer is hereby authorized to collect the tax thereon herein provided for, as other collectors of taxes in the State are authorized by law to do, together with a penalty of ten per cent. additional for failing to make the return, or payment, or for a false return, as provided for. Such railroads as do not accept the provisions of this section shall be taxed as provided for in the foregoing sections of this Act. *Provided*, that the charters of all railroad companies accepting the provisions of this section shall be hereby so amended that after the expiration of said ten years no exemptions of any property of said railroad company shall exist, but be placed upon the same footing as the property of other corporations or individuals. The charters of all railroad companies accepting the provisions of this section are hereby so amended, that, after the lapse of the ten years aforesaid, every provision contained in the provisions of the charter of said companies, exempting their property from taxation, is hereby declared null and void, in as full and ample a manner as if the same was specially set forth in their respective charters.

SEC. 12. *Be it further enacted*, That this Act shall take effect from and after its passage, the public welfare requiring it.

Passed March 20, 1875.

LEWIS BOND,
Speaker of the House of Representatives.
THOMAS H. PAINE,
Speaker of the Senate.

Approved March 24, 1875.

JAMES D. PORTER,
Governor.

SCHEDULE 8.

CHAPTER XIX.

An Act to amend an Act entitled "An Act declaring the mode and manner of valuing the property of a railroad company for taxation," passed March 20, 1875, and to adjust the rights of the State and railroads in Tennessee under the decision of the Supreme Court, holding that the 11th section of said Act is unconstitutional.

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That the Railroad Tax Assessors, provided for by an Act passed March 20, 1875, declaring the mode and manner of valuing the property of a railroad company for taxation, shall hold their office for two years, and until their successors are appointed and qualified.

SEC. 2. *Be it further enacted*, That at the first meeting of said Railroad Tax Assessors after their appointment, they shall elect one of their number as President of the Board; and said Assessors shall appoint a Secretary, who shall transcribe into a well bound book the entire proceedings of said Board, which record thus made by the Secretary shall be read over, corrected (if the same be necessary) and approved by the Board each day, and shall be signed by said Board; and said Secretary shall carefully preserve and file away all reports, documents and proof taken, as used by said Assessors.

SEC. 3. *Be it further enacted*, That as soon as said Railroad Tax Assessors shall have completed their assessment of any railroad, they shall give notice for four days of said fact through one of the leading newspapers at Nashville, Knoxville, Jackson and Memphis; and all parties interested in said assessment may, in ten days after said publication, file excep-

tion to the same, with any proof that they may desire, which shall be examined by the Assessors and passed upon ; and if in their opinion their first assessment is erroneous, they shall correct the same and certify it to the Comptroller, as provided by Section 6 of the Act passed March 20, 1875.

SEC. 4. *Be it further enacted*, That all proof taken by said Assessors shall be reduced to writing, and be sworn to and signed by the parties ; and said Assessors shall make such rules and regulations as they may think proper as to notice and the time and mode of taking all proof, so as to afford the parties interested an opportunity to be present and cross-examine witnesses.

SEC. 5. *Be it further enacted*, That the Governor be and he is hereby authorized to call a meeting of said Railroad Tax Assessors, at any time he may deem it necessary, to perform the duties imposed by this Act and the Act amended by it.

SEC. 6. *Be it further enacted*, That the Railroad Tax Assessors, in giving railroad companies exemptions under Section 3 of the Act passed March 20, 1875, shall deduct only one thousand dollars.

SEC. 7. *Be it further enacted*, That the assessment provided for by this Act and the Act passed March 20, 1875, shall be for two years, and for every succeeding two years there shall be a new assessment.

SEC. 8. *Be it further enacted*, That all railroads in the State shall, by the first day of May, 1877, and each successive two years thereafter, furnish the schedule and reports required by the Act of March 20, 1875 ; and the Railroad Tax Assessors hereafter to be appointed by the Governor shall assess all railroads in the State, and where any railroads have not been assessed for taxation under the first ten sections of the Act of March 20, 1875, by reason of having accepted and complied with the provisions of the 11th section of said Act, or for any other cause, the Railroad Tax Assessors, when they meet, shall assess the railroad as aforesaid for the years 1875 and 1876, and also all railroads in the State for the years 1877 and 1878.

SEC. 9. *Be it further enacted*, That all railroads in the State

which accepted and complied with the provisions of the 11th section of the Act of March 20, 1875, shall be entitled to a credit for the amounts respectively paid by them to the State upon the amounts due by them to the State under the assessment made, or to be made, under this Act and the Act of March 20, 1875, for the years 1875, 1876 and 1877; and if the amounts so paid by said companies shall exceed the assessment for said years, the excess shall be refunded by the State to said railroads, with interest.

SEC. 10. *Be it further enacted*, That where no assessment has been made against railroads by reason of the 11th section of the Act of March 20, 1875, or for any other cause, the assessment herein provided for shall have the same force and effect as if the same had been made by the Railroad Tax Assessors in 1875.

SEC. 11. *Be it further enacted*, That the Railroad Tax Assessors shall estimate the value of all engines, cars and rolling stock as belonging to the entire railroad upon which the same are operated, but such as belong in fact to other roads shall not be included in the estimate.

SEC. 12. *Be it further enacted*, That the salary of the Secretary of the Board herein provided for shall be four dollars per day for the time actually employed.

SEC. 13. *Be it further enacted*, That the action of the Board of Examiners provided for by the 6th section of the Act of March 20, 1875, shall be final and conclusive as to the value of a railroad. Said Board of Examiners shall examine the questions of assessment and valuation as upon an appeal upon the record made up by the Railroad Tax Assessors, and said Board of Examiners may, if they think the assessment made by the Railroad Tax Assessors is too high or too low, change the same so as to fix the real value of said railroads, which valuation shall be assessed against them, and the taxes due thereunder be paid. *Provided*, that nothing in this Act shall prevent the authorities of the various counties and incorporated towns from assessing the value of all railroad property held in their respective counties and towns not in-

cluded in the assessment herein provided for, or which may not be assessed by the Assessors as herein provided. *Provided further*, that no municipal corporation shall levy any tax upon any railroad that passes through it, in the aggregate, in excess of the rate of taxation levied by the county for the same period.

SEC. 14. *Be it further enacted*, That if any company operate and use, at the passage of this Act, more than one railroad in this State, connecting together as one line of road and branches thereof, whether the points of connection be in or out of the State, and any of such roads so used in connection with others, was, by the terms of the charter under which it was constructed, exempt on the first of January, 1875, from taxation, though another of such roads so used in connection was not so exempt by the charter under which it was constructed; then if such company operating and using such consolidated or connecting railroads will pay the State and county taxes on all and every part of such railroads so connecting and used together, and on all property appertaining to or used in the operation of such roads, regardless of charter exemptions as to such properties, according to the provisions of this Act, from the first of January, 1875, to the first of January, 1885, all and every part of such roads so used together by one company, and all the property in use in the operation of such consolidation of roads, shall be exempt from any and all municipal corporation taxes from said first of January, 1875, to January 1, 1885; and the Railroad Tax Assessors shall take proof, as provided in the fourth section of this Act, to determine what companies shall be entitled to the benefit of this section. *Provided*, that any company which operates only one road which was exempt on first of January, 1875, shall be entitled to the benefits of this section; *and provided further*, that railroad companies which desire to avail themselves of the provisions of this section, shall signify their acceptance in writing, and file the same with the Railroad Tax Assessors by the first day of May, 1877, and a failure to do so shall be construed as a waiver of the same.

SEC. 15. *Be it further enacted*, That incorporated towns through which railroads pass shall only tax such roads for

such amounts as may be apportioned to such towns by the Railroad Tax Assessors, as provided for in this Act and the said amended Act as modified by this Act; and that so much of the Act of March 20, 1875, amended by this Act as is in conflict or inconsistent with this Act, be repealed.

SEC. 16. *Be it further enacted*, That the President and Secretary of each railroad company shall verify the correctness and completeness of the schedules required by the first section of the Act passed March 20, 1875, amended by this Act, by affidavit made before some Judge of the State, and appended to such schedules; and that it shall be perjury for any such officer to willfully and knowingly swear falsely in such affidavit.

SEC. 17. *Be it further enacted*, That this Act shall take effect from and after its passage, the public welfare requiring it.

Passed March —, 1877.

EDWIN T. TALIAFERRO,
Speaker of the House of Representatives.

HUGH M. McADOO,
Speaker of the Senate.

Approved March 20, 1877.

JAMES D. PORTER,
Governor.

In the Supreme Court of the United States.

October Term, 1878. No. 673.

THE MEMPHIS AND CHARLESTON RAILROAD COMPANY, THE MOBILE AND OHIO RAILROAD COMPANY, AND THE KNOXVILLE AND CHARLESTON RAILROAD COMPANY

vs.

JAMES L. GAINES ET AL.

ERROR TO SUPREME COURT OF TENNESSEE, AT NASHVILLE.

Brief and Argument of J. B. Heiskell, of Counsel for Defendants in Error.

The main question in this case, going to the construction of nearly all the railroad charters, if not all of them, is upon that clause of the charter exempting the capital stock forever, and the road fixtures and appurtenances, including shops, warehouses, and vehicles of transportation for twenty years, and *no longer*.

I now admit, and have always in this case admitted, that in strictness capital stock means something different from stock in the hands of the stockholders, and that this court and all courts have held, and that all respectable courts hold, that capital, when expended in legitimate improvements, is, *prima facie*, entitled to any exemption that it had before being so used. But such admission will not content the

complainants' counsel. Below, hours were spent; in this court, twenty-five pages of elegantly-printed brief are expended in elaborating this undisputed proposition.

If I had a deed here conveying to A B and his heirs forever a certain lot in the city of Washington, on which stands the vendor's iron storehouse, containing this clause, but the said A B is to permit the said vendor for and during the space of three months freely to enter upon the said premises until he shall have completed the removal of said storehouse from said lot; I say, if I had this deed here, insisting that the storehouse did not pass, and the learned counsel had the other side of that proposition, what would we see? Of course it would be admitted that by a deed for lands everything attached to the soil *usque ad cælum* would pass, and that the only question was as to the effect of the other words, showing plainly a contrary intent. Such an admission would not satisfy him. Oh, no! He would tell the court what a weight of overwhelming authority settled this point. He would load the tables of the court room with book upon book, until their groaning appealed to the commiseration of the court. He would give us line upon line, and precept upon precept, as if he was building up some new juridical theory to be the wonder of the nineteenth century. What stores of forgotten lore would he gather from Shepherd's Touchstone—from Coke and Littleton! He might even, if the building was large, and the patterns particularly elaborate and costly, quote Bracton and Fleta, and read from the year books. Then would he not follow down the tides of time, and give us Blackstone and Cruise, and the reporters, and disembowel the United States digests upon the very heads of the court, with every case in which anybody had said that by a deed for land all permanent improvements pass. With what purpose? Not to make that certain which to the mind of every lawyer is certain to a certain intent in particular, but to impress it and give it the full force and effect to which

so novel, heart-awakening a proposition is entitled, until its reduplicated heftiness shall crush out everything in the case; until the court, oppressed with the load of learning, and fainting from the fatigue and exhaustion of digesting such an abundant meal of dusty erudition, forced upon their attention, may possibly lose sight of the simple point in controversy.

This is the only theory upon which I can account for the enormous array of authorities piled up to establish what no one disputes, and the utter absence of any authority whatever to establish the only point in controversy.

At any rate, so it has been in this case, maugre my attempt in two courts to convince the learned brother that a plain principle of law, admitted by adverse counsel and made the corner-stone of his argument, does not require to be established by elaborate argument or numerous authorities.

I admit, then, in strictness and in general, in legal phrase, that capital stock may include the proceeds and issues of capital stock, and may in an exemption from taxation protect the property in which that stock has been invested. On this we are really agreed. What we are not agreed upon is this: He insists in effect that so fixed is that meaning, that the words have gone beyond the line within which they are subject, like other words in the English language, to have their meaning controlled by the context, and by a sort of judicial apotheosis have become too sacred to be touched by the profane hand of construction. While I ask to consider them as mere implements in common use to express ideas of men whom too much learning hath not made mad, and not too sacred to be treated as very imperfect and human vehicles to convey thoughts.

A long experience teaches me that the English language is full of words of uncertain meaning, with no clue to their special sense but their particular context, and that

many sentences constructed with perfect grammatical propriety may be read with equal propriety in two senses. One-half of the history of the law is but a history of the ambiguities of the language, of laws, of charters, of contracts, of decisions, and judicial utterances; while more than half the disputes of theology deal in philological and textual controversy. Much of the significance and certainty of spoken language depends upon tone, inflection, and expression, lost utterly when written down and subject to utter perversion when the inflections are misplaced. The Chinese language is said to consist of words having innumerable significations, varied only by the tone or emphasis with which they are given; and the student of English must be struck with the frequency with which the same thing occurs in that tongue, and the greater frequency with which words occur having numerous meanings, distinguished neither in speaking nor writing by any variation in sign or sound. In all these, the only clue to the sense in which a word is used, is the connection in which it is found. Any consideration of language and any adoption of rules for construing it which fails to take cognizance of these qualities inherent in it, must involve only uncertainty and error, or if they result otherwise, must owe a happy result to accident.

To ascertain truly what a certain set of words convey, we must resort to the usual and proper effect of them in the connection in which they appear, and then give full weight to all that can be deduced from the connected matter. To nothing is the adage, *noscitur a sociis*, more applicable than to words. Wrest him from his connections, and he is the vague inhabitant of the lexicon, with more hues than the chameleon; with more shapes than Proteus, or the Magician of the Arabian Nights.

In this connection, too, if one matter be free from all possible doubt, and be matter upon which no ambiguity can be raised, save by giving it a strained construction,

and especially if it be as to matters tangible and actual, other matters, less free from equivoque, more abstract, and which may be brought by less strain into harmony, ought to yield rather than control.

I had said, in the court below, that, in common parlance, stock is ambiguous; and capital stock not entirely rigid and exact in its meaning. My learned brother, in his argument here, says for this the court only has my *ipse dixit*. Nothing goes here upon assertion. We are not witnesses as to the law, nor as to language. In both we appeal to others having a common education and training with ourselves; and they judge not by what we say is so of either, but by the accordance of what the one or other may say, with the cultivated and experienced ability of a court. When I assert that a word means one thing rather than another, I mean simply to say that I ask this cultured tribunal to say whether this word does not, in good English usage, mean what I say. There is, perhaps, the form of assertion, but it is in that sense; it is not *ipse dixit*, but suggestion.

Now, let us inquire into the meaning of capital stock. Capital is whatever goes into a concern as a permanent investment. Stock is whatever interest in that concern is divided into shares and sold or issued to shareholders. Capital embraces loans invested in business,—borrowed capital. Stocked capital is different from borrowed capital. Stock may be watered stock, which does not represent capital. Capital stock is, then, by its construction of the two simple words, combined, either capital arising from stock, or it is stock based on capital. It properly means either stock in capital, or capital derived from stock, according to the connection in which it occurs. When I say that A owns 100 shares of the capital stock of a company, while the shares of B are a fraudulent issue, to water the stock; or when I say the capital stock of the company consists of ten thousand shares, in the hands of the shareholders,—my expression is as consonant to usage

as when I say that the capital stock consists of $1,000,000 divided into shares. I have no fault to find with those cases which say that it has their meaning, but I appeal to these specimens of the use of the words, and the knowledge of all that hear me, if these are not admissible and proper uses of the words. I say, then, that these words are not exempt from ambiguity so as to control and override everything that comes in their way. While I admit, then, that the most frequent use of the words in legal documents and laws may be as contended, I insist that it has the other meaning which I give it in this case.

Now, I remember that in regard to land boundaries it was one of the rules that always commended itself to my experience, that course and distance must yield to calls for visible monuments and natural objects. Why? An object addressing itself to the senses is a thing about which people cannot well be mistaken. You may miscount the chains, you may drop the pins, you may find the magnetic needle not true to the pole, or you may put S. W. for S. E.; but when you go to the river, or run to the marked white oak, you know that is the best indication. Now, the same thing applies when you go to construe language. Those things that are visible to the senses are those about which language first crystallizes, and as to which it is most certain and least ambiguous.

Capital stock may be, and is, capable of more than one idea; but when you come to speak of "the road with its fixtures and appurtenances, including workshops, warehouses, and vehicles of transportation," you have tangible actualities, that will present themselves to every mind, giving out the same image and the same idea. Here, again, mere directory must yield to locative calls for natural objects.

When, in other words, abstract ideas with ambiguous expression are confronted by concrete matters not ambiguous or doubtful, the ambiguous must yield to the certain.

All that the courts below have done in this case is to apply this principle and to say, one thing is certain in this charter, and that is, that the parties both meant to make the road and property subject to taxation after twenty years; for they expressly say it shall be exempt for twenty years, and no longer. Say what you may about the chain and compass of legal decision to give a meaning to capital stock, no member of the Legislature, no promoter of the railroad, had any difficulty in understanding that this meant what it said: that the road, &c., were to be taxed. You may argue it away, you may pervert it from its true meaning; but it will not down.

When, then, the learned counsel establishes this one meaning of capital stock by such a weight of authority, and seeks with his compass and chain to run away from the river and the mountain, and the hanging rock and the marked tree, he is adopting not the mode of getting at the true meaning of these parties, but of imposing a false and artificial meaning which the parties did not dream of.

In furtherance of this artificial construction, the counsel having shown what has not been disputed in this case, that capital stock means what he says, proposes to substitute for this word the unequivocal definition which, as one of its meanings, he attaches to it; and in doing this he admits, impliedly, the superior certainty of the other set of words, for he puts them in opposition to the same words as they stand, and then truly, when one certainty stands opposed by another equal certainty, a compromise must be brought about, and a new element be introduced to reconcile what now becomes seriously in conflict. Thus he introduces, by dint of skill in hermeneutics, an exception into this clause, which the parties who undertook to say what they meant did not conceive to be necessary to express their own meaning, though I frankly admit that it is entirely indispensable to the expression of the meaning which the counsel seeks to give it. He makes the interpolation, in effect,

that *that part of the road, &c., which was not paid for with capital stock*, shall be liable, after twenty years, to taxation. Now, this court is asked to say, that when these good people—legislators and promoters—said, speaking of plain, tangible things, these things shall be taxed, they only meant *a part of these things* shall be taxed. As a witticism, that language is made to conceal our thoughts, is very happy. But it must be applied as a rule of legal construction before this court can supply terms that were so obvious to any one seeking to express what the counsel can now express so readily.

Out of all the cases cited, the learned counsel has cited but one on this point to support his position, and that one is against him. He cites and quotes from 40 Georgia, 650, to show that this precise point has been held his way; and, wonderful as it may seem that any man capable of winning his way to a high judicial position should entertain so strange a vagary, he does show that one judge in the civilized world has attempted to sustain his position in this case. But, fortunately for the credit of Georgia jurisprudence, the two other judges reject his monstrous construction, and leave my learned friend in the position described by the Hibernian lawyer, when he said that his adversary had been able to find but one case in his favor, and that one was against him.

The charter in that Georgia case contained the provision that "no municipal or other corporation shall have power to tax the stock of said company, but may tax any property, real or personal, of said company, within the jurisdiction of said corporation." It was this that the one judge held, by virtue of the word *stock*, would exempt the property. On this point, Brown, C. J., said: "The company has expressly agreed, on its part, that a municipal or other corporation may tax any property, real or personal, of said company within its jurisdiction," (p. 653,) and proceeds to attack the contrary construction with resistless force.

McKay, J., (p. 652,) on this point, says: "The State has expressly reserved the right to authorize municipal and other corporations (which includes counties) to tax, for local purposes, the property of said company of any character; * * * but it has not by any law, as yet, been conferred on the counties." Instead of being an authority for the contention of complainants' counsel, this case, therefore, is the reverse; and the opinion of the dissenting judge stands a beacon to warn off others,—a striking example of the folly to which a man may commit himself when yielding his sense and judgment in the construction of plain stipulations, he follows a course of narrow artificial and technical reasoning until he has perverted a plain statute to a sense directly against that in which its authors framed it. If courts were created to pervert law, and to thwart the self-evident purposes of law-makers, this opinion would be entitled to special eminence and boundless praise.

Now, to return to the construction given in the cases cited by the counsel to these words. They concede that the strict meaning of the words capital stock does not include the property in which that capital comes to be invested; but they hold, in effect, that when by the context, and by the course of conduct contemplated by a law, it is evident that it means the property or nothing, then that is its proper meaning. But does that establish that the word has lost its ordinary senses?

A good illustration occurs in this case. The counsel for complainant insists, that when a word has been construed through a long course of judicial decision to mean one thing, it shall be held in subsequent legislation to be used in that sense. He cites the language of Chief Justice Nicholson as to the word "*privilege*," which, in relation to taxation in Tennessee, is held to apply and cover every occupation which a man may exercise, except practicing law, where the Chief Justice holds that, by long usage and

decision, it had in legislation a particular signification, at variance with its usual meaning. Now, if the counsel was here seeking in this case to substitute for the word privilege, in the reference to the 38th section of the N. & C. railroad charter, the definition of the word for the word, so as to read, the said Knoxville and Charleston Railroad Company shall have all the rights and taxable occupations (*i. e.*, privileges) conferred by the Nashville and Chattanooga Railroad charter upon that road, he would be able to make the same argument, word for word, that he now makes, and with a result only a shade more ludicrous.

The Missouri case, with which, on page 50 of his brief, the learned counsel follows his Georgia case, seemed difficult to the court of Missouri, though it contained exactly what this charter lacks. "All property owned by incorporated companies, over and above their capital stock," says the court, "it must be conceded, is not very plain, especially when made applicable to railroad corporations." If that was not plain, how can it be plain that such an exception is intended, when it is not made?

With this, I leave that branch of the case. The construction given by the court below to this charter is the only fair and just one, and must prevail in any court capable of a just discrimination between arbitrary and narrow rules applied to pervert justice, and a liberal and enlightened application of true principles to further it.

In passing from this case in 40 Georgia, I am confronted by a question which I desire here respectfully to present to this court. The State court decides upon the construction of a State contract with a corporation. I want to suggest in that connection the effect of that decision as an authority in this court upon the law of Georgia. If that clause in that law came in in a subsequent case in review before this court, and this case was cited as a binding authority, it seems to me a clear proposition that this court must yield

to that as the holding of the highest judicature on that subject. But suppose that next case involved the question whether the State of Georgia, by a statute subsequently passed, impaired the obligation of that contract, and the State court were in that case to affirm the doctrine of the 40th Georgia case: now, I want to know what would be the effect of that presentation of the question? Would that be controlling authority, binding upon this court? It seems to me no lawyer, educated in the principles of constitutional law, could assert that the fact that this court could pass upon the question, took away or impaired the binding authority of that holding. If it came up in a litigation between A and B, involved collaterally, originating in the Federal Circuit Court, it would be conclusive. If it came up at the same time directly in a case with the State as a party from a State court, would it be held otherwise?

Now, the next question in the present case is precisely what I have supposed in respect of the Georgia case. The facts stated in the argument of complainant's counsel need this correction. He states truly that the Legislature passed an act in 1877 inconsistent with the eleventh section of the act of 1875, but he omits to state the fact very material in my view, that immediately preceding the passage of this act the Supreme Court of Tennessee, the highest judicial authority on that subject, had declared, by a decision conclusive upon the Legislature, conclusive on every citizen, conclusive on this court, conclusive on the world, subject to no review, and conclusive forever unless reversed by themselves, that this eleventh section was in violation of the Constitution of the State of Tennessee, and void. That it was, therefore, not a contract. The Legislature then, bound by that decision, passed the act of 1877,—conformed themselves to the inevitable. Now, it is said that in doing so they have impaired the obligation of that contract, which the highest judicature upon that question, higher *pro hac* than this superb tribunal, had held to be

naught. Before the passage of that act, the same question might have come before this court; and this court, bowing in deference to the conclusive authority of that decision, would say, We are bound. But the act having passed, it is contended that it is of no further authority. But yesterday the word of Cæsar might have stood against the world; now none so poor to do him reverence. The question comes here in precisely the same attitude, in substance and in fact, in both aspects in which I present it. The mere guise in which it comes does not alter its substance. It is the same.

In Knoop *v.* Ohio, it is said this court has held otherwise. So be it. All that I say at present is, that in the aspect in which the question is presented in this case, it has not held that the authority of the State court is not obligatory. I cannot easily express the confidence I feel, that it will never so hold, without transcending that moderation of statement which the proprieties of this presence impose.

In the court below, as Attorney-General of Tennessee, I deemed it the interest of the State to support the eleventh section of the act of 1875, and made the following presentation of that question. I had formerly taken the same position in Ellis *v.* The L. & N. R. R. Co.:

The Constitution requires all property to be taxed. It confers the power on the Legislature to empower counties and towns to tax on the principles that are adopted as to State taxation.

Now, clearly, this tax is not objectionable as a State tax. The Constitution in the case of each individual tax-payer has a two-fold operation. It protects him by saying that he and his property shall not be taxed higher than his neighbor—that is one operation. It protects his neighbor by saying that it shall not be taxed lower than the neighbor. Now, A may waive his exemption and pay a higher State

tax than his neighbor. He only waives his constitutional privilege. The tax, then, as a State tax is valid, and not subject to any constitutional objection as to that—for the State gets largely more, and the railroad has waived the protection which the Constitution gives.

To show that the State tax is higher: The roads are averaged at $14,000 per mile, their gross receipts at $5,000 per mile. On the $14,000 they would pay, at 40 cents, $56; on the $5,000, $75 at $1.50—$19 more per mile. But this road claims to be exempt on 400 miles in the State and subject to tax only on 40, so it pays on ten times as many miles. $75 per mile on 350 miles would make $26,250. The tax on 45 miles at $56 would be $2,520. Surely no one of the neighbors will complain as to the State tax.

Now as to the county tax.

The county has no power to tax, except what the Legislature confers. The counties could collect no tax by virtue of the Constitution. Until the Legislature acted, the power did not exist. When the Legislature acts, that act is subject to no revision or control. It is in its nature supreme and without revision. If it conferred a power on the counties to tax nothing but land, could this court say that because they ought to have imposed the tax on every species of property, therefore the county could exercise the power that the Legislature had not conferred, and therefore the county had the power to tax everything? The Constitution could not be so read. The taxing power could only exist so far as conferred, and if it was not conferred as the Constitution required, it could not exist where it was not conferred, because the Constitution only allowed it to be conferred, not to be exercised without being conferred.

Now, the Legislature unquestionably has the power to take away the whole taxing power from counties and towns. Suppose it had done so, and then had conferred upon them anew the power to tax everything but railroads—then

would they have had the power to tax railroads without it being conferred? Certainly not. But this is the same thing—nothing more, nothing less. It is not, therefore, invalid as to the power conferred on the counties, or as to county taxes.

It is now my duty to support the law of the State, as held by the Supreme Court and adopted and acted on by the Legislature, and I yield the positions that I once thought it my duty to uphold for the State, and ask this court to respect the decisions of the highest authority on that question—settled in the court of the State, and acted upon by the Legislature before this controversy arose.

The argument from the Hick's case is about like this. A penny saved is a penny got. A horse sold is a horse made. Therefore, horses may be raised by means not shown in the stock-breeders' manuals, or the work on physiology.

So, an exemption sold is an exemption made clear. This court has held that an exemption may be sold by the consent of the Legislature. Therefore, the Legislature may create an exemption. One is just as proper a result as the other. The court recognize the power of the Legislature to allow a sale of what a company has. It does not in any sense tolerate the idea of its creating the same thing, if not already in existence. The Supreme Court of the United States has declared that an exemption is personal, and cannot be sold without legislative authority. The court of Tennessee have said that though the Legislature cannot create an exemption, it may allow the transfer of an existing exemption. There is nothing beyond this in the Hick's case.

The counsel says that the Charleston road being exempt when the Constitution of 1870 was passed, the Constitution did not attach to it. If the Constitution had regarded this as land, and had used the words of the Consti-

tution of 1834, "all lands subject to taxation, &c., shall be taxable," then there would have been a plausible ground for the argument. It might be said that this property, being exempt at the time of the adoption of the Constitution, was by its words excepted from its operation; not being *subject to taxation* then, and being so excepted, the Constitution did not operate as to it. But this would not be sound; for the Constitution does not speak for the day of its date alone, like a deed, but it may be treated as always speaking in the present tense,—as continually operating, like a flowing spring. All lands subject to taxation shall be taxable, means not only all lands now subject, but all lands at any time subject. If now temporarily exempt, still when subject, they shall be taxed. Whenever the Legislature come to tax, they should look and see that they taxed everything then subject to the tax. But the Constitution of 1870 leaves out even this declaration of exception, and takes away the whole pretext for such an argument. It says "all property shall be taxed," exempt as well as non-exempt, and leaves the exempt property to secure its exemption in spite of the Constitution, instead of in virtue of it. Of course, no such argument is even plausible now.

The counsel says that the Legislature may commute a tax for an exemption, though they cannot create an exemption. In other words, they may buy in an exemption. Now, while a valuable consideration is necessary to support a deed, it is not an element of validity in a statute. It may be a proper consideration, that is, proper matter to be considered by a Legislature; but a higher consideration, of which that is only one element, is the public weal. All statutes are to be passed for the public good, and one for value in money may be much against the public good. It results, that if this reasoning should obtain that an exemption may be granted to buy in an exemption, if it may be created for a money compensation, it may *a fortiori* be created for the

higher consideration of the general welfare. So the constitutional prohibition on this theory is a dead-letter.

The State certainly has the right to buy in an exemption, but to buy does not necessarily imply that the means to buy are to be seized upon *per fas et nefas*. If I have the right to buy a riding horse, does it imply that I have the right to steal the money wherewith to pay for him? No more does the right to buy an exemption imply the right to take private property to pay for it without compensating the owner, or the right to grant power to take illegal interest, or the right to make a special tribunal to try offenses against a particular corporation. A Legislature may buy with what she has. She cannot unlawfully seize upon a thing because she wants it to buy something.

The exemptions in these cases all run from the date of the finishing of the principal road.

Nothing is better settled than that every intendment is to be made against an exemption. Of course, this includes duration as well as extent, longitude as well as latitude, length as well as breadth. But even this is not left to inference. The Supreme Court of the United States have spoken on this subject, and this particular branch of it. In the case of Tucker *v.* Ferguson, 22 Wall., 575, the court say of such an exemption: "Every reasonable doubt should be resolved against it. Where it exists it is to be rigidly scrutinized, and never permitted to extend, either in *scope or duration*, beyond what the terms of the concession clearly require. It is in derogation of a public right, and narrows a trust created for the good of all." The same doctrine is affirmed in 93 U. S., 595.

I have, then, only to make a case of reasonable doubt to fix the question.

Now, I do maintain that when I give to A a privilege for a given time from the doing of a certain act, and to B the *same* privilege, that if B can do a similar act from which

his privilege may date, it is by no means certain that the privilege runs from the similar act, and not from the principal act. On the contrary, it would seem that *prima facie* the reverse would be the case, and that it would take something to raise a reasonable doubt against that construction. When, therefore, an exemption is granted to the Nashville and Charleston Railroad Company for twenty years from the completion of their road, and to other roads the same exemption, I say it is claiming very little to say that it is *equivocal* whether the exemption is to run from the finishing of the Chattanooga road, or from the finishing of the roads respectively. That was the great pioneer line, made through a country of unequalled difficulties and obstacles. Other roads were chartered shortly afterwards, and they were through country very different as to length of line, circumstances, and obstacles. Why should they have the same time after completion, and not an exemption terminating at the same time? I say there is a reasonable doubt in favor of the twenty years from the completion of each, but nothing more.

But we are to look at the Constitution of 1834. That did not require railroad property to be taxed, but it did require that when any kind of property was taxed, that all of that kind of property should be taxed. Now, when the Legislature say these roads shall have the same exemption as the Nashville and Chattanooga road has, why not say that this is to be construed in view of the Constitution, and that, as far as is consistent with the statute, this shall be made to operate so as to allow these roads all to come under taxation at once? There is no injustice in this. On the contrary, it gives to each an inducement to finish as soon as possible, to extend its exemption, whereas the contrary construction gave a premium to delay. It seems to me, that it takes something to raise a doubt in favor of the roads on this question, whereas I am only required to raise a doubt to have my construction adopted.

But suppose the other to be the true construction, then we say the charters in every case fixed the period in which the roads were to be finished. This was an imperative condition. Now, the time of the twenty years is clearly to be computed from the completion, if within the time required. You are bound to finish within a certain time. Of course you are to do that, but if you finish within that time, then the twenty years runs from the time of actual completion,—not the time given for completion. The whole statute is to be construed together. Of course the Legislature did not mean to require the completion in a certain time, and then to say, but if you don't complete until long after that time, you are to have the exemption from the time of actual completion,—not of required completion. All such stipulations are to be construed against the company,—not against the State.

As to the Mobile and Ohio road, I am compelled to concede that this road has an exemption of twenty-five years from the time it ought to have been completed, and that the time has not expired. It is, therefore, entitled to the exemption which it claims at present. I do not desire to go into the other question at present. As stated in this bill, it would at least make an amusing question as the matter is framed. Its other exemption is wholly contained in these words: "no tax shall ever be levied on said road or its fixtures which will reduce the dividends below eight per cent." The bill states that it has never declared or earned any dividend. Nothing, therefore, goes to the stockholder for whose benefit this eight per cent. dividend clause is granted. The law makes no provision for the bond creditor that he shall not be onerated with a tax; only that the dividend shall never be reduced by tax below eight per cent. Now, there must be a dividend ready to bring this protective clause into operation; something coming to the stockholder. It cannot operate to protect NO

dividend, which affects the creditor only. But this is a question that was not settled in the State court; the other exemption was conclusive for the present. As the court below decided that the twenty-five years granted to this road had not expired, and so they were entitled to be exempt from the tax of which they complain—the tax for 1877—and declined to anticipate and determine upon what defenses might or might not be set up to the taxes for 1880 or 1885, I do not consider that I have this question before this court. This court cannot reverse the action of the State court in not giving all the reasons they might have given for a right decision, nor allow a party to appeal who has got all the relief he asks. The writ of error ought to be dismissed as to this road.

I now pass to the exemption claimed for the Knoxville and Charleston Railroad Company under this clause in the charter: "Said company is hereby invested, for the purposes of making and using said road, with all the rights, powers, and privileges, and subject to all the liabilities and restrictions, that have been conferred and imposed upon the Nashville and Chattanooga Railroad Company in its original charter."

The Supreme Court of Tennessee, before this case came before them, had decided two cases involving the same question, and they in this case only adhered to their previous rulings. In one of these, with a mere inversion of the order, the words were substantially identical. The charter of the Mississippi and Tennessee Railroad Company contained this clause (Acts of 1853–'54, ch. 7, sec. 2, Sess. Acts, p. 34): "Said company shall have perpetual succession, sue and be sued, plead and be impleaded, and *have all the rights, powers, and privileges to construct said road* in this State, as are given to the Memphis and Charleston Railroad Company by their original and amended charters, so far as the same are applicable, as though the same were enacted herein in words and the powers therein specially

declared." The provisions of the Memphis and Charleston Railroad charter were substantially the same as those of the Nashville and Chattanooga, to which the present charter refers. The court, as stated in their opinion in this case, held the exemption not to pass.

To my mind, the words powers and privileges to construct, are, in a material respect, different from a simple grant of powers and privileges. In the charters referred to were all the essential grants of a railroad charter essential to the construction of a road: rights of way, summary condemnation, and inquiry of damages; of road-bed and ground for depots, shops, &c.; rights of entry on adjoining land to get material, and a large class of privileges strictly necessary to the construction and use of the road; and the holding of the court in that case is, therefore, clearly right. In this case the same principle precisely governs the construction of this charter, and the decision of the court is clearly right.

The court proceed to say, that they have also negatived the exemption in a case stronger in favor of the exemption than this. "Here the company is vested," for the purpose of *making and using* said road, with the powers, rights, and privileges of the former company. In the case referred to, the new company was vested "with all the rights, powers, and privileges of the former company," without the apparently qualifying words.

In that unreported case of Hamblen County *v.* E. T. and Va. R. R. Co., the opinion, so far as it is material, is in these words:

"There can be no question, if we adopt a liberal construction, that an exemption from taxation might be included under the terms rights or privileges; but it is a settled and uniform rule of construction, according to all the authorities, that no exemption from taxation can be allowed unless it be granted in plain and unambiguous terms. Every presumption and intendment is against it, and every doubt in

the language used is to be resolved against the exemption. Bearing this in mind, it results that the rights, powers, and privileges of the Nashville and Louisville R. R. Co. did not carry with it the immunity or exemption from taxation granted to that company. Full meaning may be given to the words rights, powers, and privileges, without including exemptions. This view is strengthened by the language used in the eighth section of Article XI of the Constitution, by which the Legislature is forbidden to pass any law granting to any individual *rights, privileges, immunities*, or exemptions other than such as may be by the same law extended to any member of the community who may be able to bring himself within the provisions of such law.

"The use of all these terms indicates that a separate meaning is attached to each, or at any rate that 'rights and privileges' do not necessarily include 'immunities and exemptions' in the sense in which the framers of the Constitution used the terms.

"The exemption in this case, not having been granted in explicit and unequivocal terms, cannot be allowed."

It is to be remembered that these words on the subject of laws conferring rights and privileges, immunities and exemptions, in the Constitution of the State of Tennessee, are found in immediate connection with the reservation of the power to create charters of incorporation. That follows the other as a proviso or exception; provided that the Legislature may grant such charters of incorporation as they may deem expedient for the public good.

The use of the restrictive words is thus brought into direct relation to the subject of charters, and becomes fairly a consideration, when the words so used in so solemn an instrument as a constitution are adopted in a law immediately affected and restricted by its provisions.

The word privileges does not, therefore, in this construction of it, stand upon a proper meaning of it as a mere English word, but as standing opposed to other words more appropriate to express the special meaning which complainants seek to attach to the word. When the Consti-

tution puts these words in opposition, in restricting the power of the Legislature, it is certainly no more than fair to require the Legislature and those asking its aid to consider the nature of the discriminating restriction, and the terms in which it is expressed, and to require them in like manner to express clearly whether they mean to make their use of the power conferred operate, under one or both of the operative words of the Constitution.

I take it for certain, that when a power is conferred in words which discriminate between two objects, though in a liberal use of one of the words it might be held to cover both, yet if only the one is used in the exercise of the power, it would in the absence of any other indicia, or any general presumption in favor of the intent to execute the whole, have the restricted sense in an appointment under it.

That is in effect what the court of Tennessee hold, that in the exercise of a power to confer special *privileges* and *immunities*, if the promoters ask only for *privileges* and the Legislature grant only privileges, the grant shall not be construed to confer both privileges and immunities.

Now, we insist, first, that this is right, and that this court ought to so hold if the question was before them *res integra*.

But we also insist that this is a matter of Tennessee law; the construction of the Constitution of that State and of the laws as affected by the Constitution, and so is a matter for the courts of Tennessee to settle; and that having settled it not only in this case, but in others previously, this court, by its own rules, will regard the decision as authority.

In this case the judge delivering the opinion has expressed the opinion that this is a question to be settled in this court. He says, as this court has a revising power, it is our duty to conform ourselves to the rulings of that tribunal. Now, I have already intimated a doubt upon

that under the circumstances of this case. I have also presented the question in a form that, it seems to me, must at some time so come before the court, that the subject may require a general reëxamination. The mere fact, given as a reason by Judge McFarland, that this court has a revisory jurisdiction does by no means establish that this court is bound by no rules in the exercise of that jurisdiction; and unless it does that, it does not establish that this court can reverse the construction of a State court upon its own statute, because it has a case before it of which it has jurisdiction. Nor do I see that the rule is varied if the State is interested in the question, and the State court has held that there is no contract to be impaired. If Judge McFarland states the only ground on which this right is based, (and, frankly, I believe he does,) then I submit that it is not tenable. It might as well be said that this court can revise a case coming from the Circuit Court of the United States, where they have followed a State decision, and therefore they have the right to reverse that State decision. A *non sequitur*, surely. Why not equally a *non sequitur* in the case stated by Judge McFarland?

The opinion of the court then proceeds to show that the case of Humphrey *v.* Pegues, 16 Wall., 244, is not, as an authority, opposed to the ruling the court was then adopting and following; the meaning of the word privilege being taken for granted, and not directly made or considered. When that case is examined, it will be seen that the counsel on both sides put the case on other questions entirely, not involving the meaning of the word privileges, as connected with, or opposed to, exemption; but both treating it as covering exemption. One insisted that the privileges of the original charter were conferred, by the new act, upon a new company; while the other insisted that the privileges of both the original and amended acts

were conferred. This court, therefore, had its attention exclusively directed to the question whether the privileges meant, by the words "privileges granted by the charter," to include the privileges granted by the amended charter. I say this was the only question presented by the argument. The opinion does speak of the importance and value of such an exemption, and does show that such an exemption comes within the ordinary meaning of the word privilege; which we do not deny. But the court also shows that the charter, as presented in that record, does not show what other matter there was to which the word privilege can apply.

Now, I understand Judge McFarland, in what he says of this case of Humphrey *v.* Pegues, simply to mean that this case, if a decision on this point, lacks one of the most important elements which gives weight to a decision.

A decision on a question which is first subject of a *contestatio litis*, which is argued and contested by counsel, and presented on the one side and on the other as a matter for legal judgment, in the light of argument on both sides, to the awakened judgment of a court, is entitled to great weight. An adoption of a theory in which both sides agree, on which the court is not asked to decide, but where its attention is wholly called to another question, to which the contestation is confined, is entitled to a very different sort of consideration as authority. Such a presentation only tends to lull a court into a false security on the matter which both parties pass over as uncontested.

The weight to which this case is entitled is further affected by the case of Morgan *v.* Louisiana, 93 U. S., where this court distinguished between "*franchises*" *and* "*immunities*," and between those positive "privileges without the possession of which the road of the company could not be successfully worked," and *immunity* from taxation which is not such. "The former," say the court, "may be conveyed to a purchaser of the road as part of the property of the company; the latter is personal, and incapable of transfer

without express statutory direction." The court, therefore, classifies privileges into essential and personal, and so far fortifies the view that a grant of privileges to construct and operate a road may very properly be held to be confined to essential privileges, while "immunities" is the proper word to clearly express the idea of exemption from taxation and privileges of that class.

This case further shows that this court did not regard the word privileges as necessarily having the effect to cover *immunities;* for they say immunity from taxation is a privilege which may *sometimes* be transferred under that designation, as held in Humphrey *v.* Pegues, 16 Wall., 244.

But the most significant matter in this case is this: "Franchise" is defined by Webster as—"1. A particular *privilege* or *right* granted by a prince or sovereign to an individual, or to a number of persons; as, the right to be a body corporate, with perpetual succession; the right to hold a court leet, or other court; to have waifs, wrecks, treasure-trove, or forfeitures. So the right to vote for governors, senators, and representatives is a franchise belonging to citizens, and not enjoyed by aliens. The right to establish a bank is a franchise. 2. An exemption from a burden or duty to which others are subject." Johnson defines it—"1. Exemption from any onerous duty. 2. Privilege, community, right granted. 3. District extent of jurisdiction." Bouvier: "A special privilege conferred by government on individuals, and which does not belong to the citizens of the country generally by common right."

The word "franchise," then, to which is given this limited construction, is therefore cut down in precisely the manner and to exactly the same extent to which we seek to restrict the word "*privilege*" in this case.

The case of Chesapeake, &c., Railroad Company *v.* Virginia, 4 Otto, 719, is another of those cases in which the matter contested was not what was covered as privileges, but what, assuming privileges to include all that one party

asked, was the extent of the privileges granted. What was the effect of a consolidation act giving to a consolidated company the rights and privileges of several companies not having the same immunities? In this case the court say not one word about the word privileges, but use the word rights as convertible with it in one part of the opinion, and in another insert immunities as necessary to make full the sense.

They only hold that the grant gives to a consolidation what the roads had before, and does not extend to each what the other had.

This is but a reassertion of what this court has so often repeated—that every intendment is against such a grant, which they state in full in the Delaware Railroad Tax Case, 18 Wall., 225, 226.

The Railroad Company *v.* Maine, 96 U. S., 509, is perhaps the strongest application of this principle yet made. There the privileges and *immunities* granted to two roads were, upon consolidation, granted to the new company; but certain reports which were necessary to a restricted tax guaranteed by the original charters, as they can no longer be made by the same officers, but only by corresponding officers of the new company, were held to stand in the way of the *immunity* given, and that it was lost.

The same principle was stated, in the strongest terms, in the case of The Northwestern Fertilizing Co. *v.* Village of Hyde Park, in regard to the charter of a company to remove offal, &c., from the city of Chicago, decided November 11, 1878.

In commenting upon Trask *v.* Maguire, 18 Wall., 224, in the case in 93 U. S., the court *italicized* the word *immunities*, to distinguish it from privilege, and adopt the word immunities as expressing exemption from taxation.

The Supreme Court of Tennessee, to say the least, have, in this view, only carried out in good faith the principles which this court has laid down, and followed the examples

by which this court has illustrated the principles. They have done this in a spirit of the highest deference to this tribunal; and, indeed, as I think, have acknowledged an obligation to do so that does not exist. Withal, they have not, in this case, carried it to the extent which the rulings of this court would justify. If to be in doubt is to be resolved, then they had grounds for doubt as reasonable and as cogent as this court in Morgan *v.* Louisiana, or in Trask *v.* Maguire, or in the Maine Case. The last, as the latest measure of the strictness which courts are authorized to require when the people of a State are to be despoiled of their rights to fair contribution from all citizens, has not been exceeded by the court of Tennessee in the present case. If, then, this court shall hold that, in the peculiar presentation of this case, the decisions of the State courts are of no controlling weight, still they, I respectfully submit, must say that the courts of Tennessee have not exceeded the bounds which this court has set.

Even if they had, there is a broad line to be covered by the weight of authorities, not controlling, but persuasive; and what may not be conclusive as to Tennessee law and Tennessee constructions of her own law, may at least turn a vibrating scale.

J. B. HEISKELL.

CONSTITUTION OF TENNESSEE OF 1834.

ART. 2, sec. 28. All lands liable to taxation held by deed, grant, or entry, town lots, bank stock, slaves between the ages of twelve and fifty years, and such other property as the Legislature may from time to time deem expedient, shall be taxable. All property shall be taxed according to its value, that value to be ascertained in such manner as the Legislature shall direct, so that the same shall be equal and uniform throughout the State. No one species of property from which a tax may be collected shall be taxed higher than any other species of equal value. But the Legislature shall have power to tax merchants, &c.

ART. 11, sec. 7. The Legislature shall have no power to suspend any general law for the benefit of any particular individual; nor to pass any law for the benefit of individuals inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals *rights, privileges, immunities,* or exemptions other than such as may be by the same law extended to any member of the community who may be able to bring himself within the provisions of such law: *Provided always,* The Legislature shall have power to grant such charters of incorporation as they may deem expedient for the public good.

CONSTITUTION OF 1870.

ART. 2, sec. 28. All property, real, personal, or mixed, shall be taxed * * * * . All property shall be taxed according to its value, that value to be ascertained in such manner as the Legislature shall direct, so that the taxes shall be equal and uniform throughout the State. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of the same value * * * .

ART. 2, sec. 29. The General Assembly shall have power

to authorize the several counties and incorporated towns in this State to impose taxes for county and corporation purposes respectively, in such manner as shall be prescribed by law; and all property shall be taxed according to its value, upon the principles established in regard to State taxation * * * .

OPINION OF THE SUPREME COURT OF TENNESSEE.

THOMAS S. ELLIS, REVENUE COLLECTOR FOR SUMNER COUNTY,

vs.

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

FEB'Y 3, 1875.

The Legislature of Tennessee passed an act on 20th of March, 1875, approved by the governor on the 24th day of March, 1875, entitled "An act declaring the mode and manner of valuing the property of a railroad company for taxation."

The preamble to the act recites, that "*Whereas*, it is provided, in section 28 of article 2 of the Constitution of this State, 'that all property shall be taxed,' and, further, 'that all property shall be taxed according to its value, that value to be ascertained in such manner as the Legislature shall direct, so that taxes shall be equal and uniform throughout the State.'" The preamble then recites the four elements of property in all joint-stock companies to be—1. Capital stock; 2. The corporate property; 3. The franchises of the corporation; 4. The individual stock of the shareholders.

The first section of the act provides that each company owning and operating a railroad in the State shall, on or before the first of May of each year, file with the comptroller a complete schedule of all its property, real, personal, and mixed, showing the length of its entire road-bed, side tracks and switches, and how many miles of the same are in the State, and how much of the same is in each county and incorporated town of the State; the value of the whole and each part thereof; the amount of capital stock;

its gross receipts; the number of engines and cars, and their kind and value; depot and other buildings; machine shops and stationary machinery, and tools therein; and in what county and town located, and the value of each; and all other property, real, personal, or mixed, with its value.

The second provides for the appointment by the governor of three assessors, upon the filing of the schedule, or failure to file the same, neither of whom shall be interested in the management of any railroad, who are required to take an oath faithfully and impartially to discharge their duty as railroad tax assessors.

The third section prescribes the powers and duties of the assessors, and the manner of ascertaining the value of the property to be taxed; which they are then directed to certify to the comptroller.

The fourth section authorizes the assessors, if the company fail or refuse to file the required schedule, or file one not regarded fair and just by them, to ascertain the items and value of such property in such manner as they may deem best, and add ten per cent. to the taxes of said company for such failure, or filing one not fair and just.

Section 5 allows any two of the assessors to act, and makes provision for their compensation.

Section 6 makes the governor, secretary of state, and treasurer a board of examiners, to revise the assessment, and if in their opinion it is too low, or not just and fair, the governor shall appoint another board.

Section 7 directs, when the valuation is ascertained and certified to the comptroller, he shall ascertain the amount of taxes due, notify the company by letter or otherwise, and shall certify to the County Court clerk of each county in which the railroad lies the amount to be taxed in said county for county purposes, and shall also certify to the mayor of any incorporated town the amount to be taxed by such town, and the clerk of the County Court shall enter the same upon the collector's books, specifying the amount to be collected, as now provided by law.

Sections 8 and 9 prescribe the manner in which the State and county taxes shall be collected.

The tenth section has reference to the taxation and valuation by towns and cities.

The eleventh section enacts that any railroad company "which will accept as a special amendment to its charter,

for a period of ten years from the 1st of January, 1875, and that will pay annually to the treasurer of the State one and one-half per cent. on the gross receipts from all sources of such company, *shall be exempt from the provisions* of the foregoing sections of this act; and the payment of said one and one-half per cent. upon all gross earnings shall be in full of all taxation."

This section then directs how the gross earnings shall be ascertained and paid into the State treasury.

A proviso to the section shows the amendment to the charter contemplated to be, "that after the expiration of said ten years, no exemptions of any property of said railroad company shall exist."

The twelfth and last section of the act simply provides that the act shall take effect from and after its passage.

Under the provisions of the first ten sections of this act, the governor of the State, in June, 1875, appointed John E. Helms, of East Tennessee; J. J. Turner, of Middle Tennessee; and I. A. Bradford, of West Tennessee, as railroad tax assessors for the State.

The act required that one of the assessors should be taken from each of the three grand divisions of the State.

The assessors met at Nashville in July thereafter, and were qualified and assumed the duties of their offices.

They made their return of the valuation of the main stem of defendant's road, from Louisville, Kentucky, to Nashville, a distance of 185 miles, and of other roads, to the comptroller in September, 1875. And thereafter the governor, secretary of state, and treasurer, as a board of examiners, passed upon the valuation ascertained by the assessors, approved the same, and certified the same to the comptroller, who certified to the clerk of the County Court of Sumner county, on the 1st of November, 1875, as required by section 7 of the act, that "the value of the Louisville and Nashville Railroad, lying in Sumner county, has been assessed at $605,520, which amount, under the statute above referred to, is liable to be taxed for county purposes," and was at once placed upon the collector's books by the clerk, as the amount of the taxable property of defendant in Sumner county.

The defendant refused to pay the tax assessed, and the revenue collector issued a distress warrant May 29, 1876, which was levied upon a number of freight cars, as the

tion. The company owned, besides its main stem, by lease and purchase, other roads in this State, which it claimed to be exempt from taxation.

It was undoubtedly the object of the Legislature, as shown by the preamble to the act of 1875, to impose a tax upon the property of the railroad companies of the State, equal and uniform with that imposed upon the property of individuals.

The preamble recites material parts of section 28 of article 2 of the Constitution: First, the imperative direction, "all property shall be taxed"; second, "all property shall be taxed according to its value, that value to be ascertained in such manner as the Legislature shall direct, so that taxes shall be equal and uniform throughout the State." To which may be added the further paragraph in the same section, as pertinent to the subject under discussion: "No one species of property from which a tax may be collected, shall be taxed higher than any other species of property of the same value."

But it is insisted that the eleventh section of the act proposes, upon certain conditions, a different rule of taxation than that provided for in the first ten sections of the act.

These first ten sections prescribe a mode of ascertaining the value of the property of railroad companies, that it may be taxed equally and according to its value, as other property in the State, by the State, counties, and incorporated towns; while the eleventh section provides a different rule of taxation, for the benefit of the State alone. All the taxes paid under this section are to be paid into the treasury of the State, in full of all taxation.

If this eleventh section does not impose a tax upon the railroad company's property, according to its value, equal to and uniform with other taxation of property throughout the State, it is inconsistent with the requirements of the Constitution, and cannot be sustained, notwithstanding the amendment of the charter of the railroad company, surrendering supposed exemptions from taxation after ten years.

Whether a different rule might be adopted as to railroad companies exempt from taxation upon accepting the amendment proposed in the eleventh section of the act, need not be discussed in this case.

The surrender of the supposed immunity from taxation, though it might be a good consideration for the grant of

special exemptions or privileges, in the absence of any constitutional prohibition to make such grant, cannot give validity to an act of the Legislature which it is prohibited by the Constitution from passing.

It is argued, in support of the validity of this eleventh section, that the one and one-half per cent. of the gross earnings of the road is, by the act, ascertained to be equal to the tax assessed on other property. And if the Legislature has adopted this mode of ascertaining value, it is authorized to do so by the express provision of the Constitution, that the value of property to be taxed shall be ascertained in such manner as the Legislature shall direct.

If the tax of one and one-half per cent. on gross earnings is to be construed as the amount of tax arising upon the value of the company's property at 40 cents on the $100, then if the tax next year should be 80 cents, the company should pay three per cent. to preserve equality and uniformity, unless their property should depreciate one-half in value.

But the one and one-half per cent., under the construction insisted on, cannot be increased under the legislative contract contained in the eleventh section.

The first ten sections of the act do aim at equality and uniformity. But the eleventh section proposes to release the companies, for one and one-half per cent of their gross earnings, from the operation of the equal and uniform taxation provided in the preceding sections, and substitutes unequal taxation, or exemption from all taxation, for the annual payment of a sum to be ascertained, indefinite, uncertain in amount, and dependent upon the amount of their business.

The eleventh section does not purport to ascertain the value of the property of the companies, nor does it purport to levy a tax upon such property according to its value. But, on the contrary, it proposes to relieve them from the equal and uniform tax upon their property levied by the preceding sections, and to accept 1½ per cent. of their gross earnings in full of all taxation.

The Legislature may direct the manner of ascertaining the value of property; but it cannot tax it otherwise than according to its value. It may choose what agencies it thinks best to ascertain the value of property, but the taxes imposed must be equal and uniform.

Under section 11, for a consideration, the Legislature has contracted, in effect, not to tax property of railroad companies at all.

This cannot be done under our present Constitution.

The judgment of the Circuit Court will be reversed, and judgment rendered here in favor of plaintiff.

DEADERICK, C. J.

Thomas S. Ellis, Revenue Collector for Sumner county,
v.
The Louisville and Nashville Railroad Company.

I concur in the conclusion reached in the opinion of the chief justice, but would add that I express no opinion as to those railroads in the State which have accepted the provisions of the eleventh section of the act approved March 24, 1875, *claiming at the time to be exempt from taxation under their charters.*

That part of the road of the defendant now in controversy (being that part of the original line of the Louisville and Nashville in Tennessee) was not claimed to be exempt from taxation under its charter. It was therefore property subject to taxation, and the twenty-eighth section of article 2 of the Constitution requires not only that it shall be taxed, but it shall be taxed according to its value. The provisions of the first ten sections of the act of March 24, 1875, provide for ascertaining the value as required by the Constitution, to the end that it be taxed according to its value. The eleventh section does not purport to ascertain the value, but to substitute a fixed tax upon the income, as an amendment to the charter, for ten years; and a conclusive argument against this being a compliance with the Constitution as to equality in taxation, is that the rate fixed—1½ per cent. on the gross receipts—is to remain the fixed rate as part of the charter for ten years, no matter how the rate of taxation as to other property may be increased by the public exigencies.

But it is said this provision is valid as an amendment to the defendant's charter, and that the Legislature had the undoubted right to provide for the amendment of charters, and as it was competent in the original grant of the charter to exempt the property from taxation, or to stipulate for

a fixed sum in lieu of taxation, that the same might be done by an amendment; that the powers of the Legislature in this regard were not changed by the Constitution of 1870. How this might be where an amendment is granted, stipulating for a special tax in consideration of some right released by the corporation, it is sufficient in this case to say that the eleventh section of the act of March, 1875, while it purports to offer an amendment to the charter of the several railroads, in reality does no more in respect to roads having or claiming no exemption than to give to them their election as to which of two modes of taxation they will submit to. It amends the charter in no other respect; it provides for nothing except for the taxation of such companies. As to those railroad companies whose property was exempt from taxation, or claimed to be, so that they could not be taxed except they voluntarily assent thereto by accepting an amendment to their charter upon this consideration, the question would be presented in a different aspect; and as to this I express no opinion. But where no exemption was claimed, it was simply offering to this class of property holders the right to elect which of two modes of taxation they would adopt: one the mode required by the Constitution, the other entirely different; attempting to do indirectly what could not be done directly. The eleventh section, as to this class of roads, acquires no additional validity by calling it an amendment to the charter. It is in reality nothing but a tax law.

The fact that this defendant owns other roads in the State, which [illegible]imed to have been exempt from taxation, and which exemption it is claimed was relinquished by accepting the provisions of the eleventh section, can, I think, made no difference. These other roads were constructed under different charters and are governed by different rights. Accepting an amendment, in respect to these roads, would furnish no sufficient ground to release this property, which is admitted to have had no exemption.

McFARLAND, J.